

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**





**BRIEF FOR APPELLANTS AND JOINT APPENDIX**

**United States Court of Appeals**

**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**No. 13,196**

*United States Court of Appeals  
For the  
District of Columbia Circuit*

FILED APR 7 1956

**DERMOT A. NEE,**  
and  
**ANTOINETTE K. NEE,**  
**Appellants**

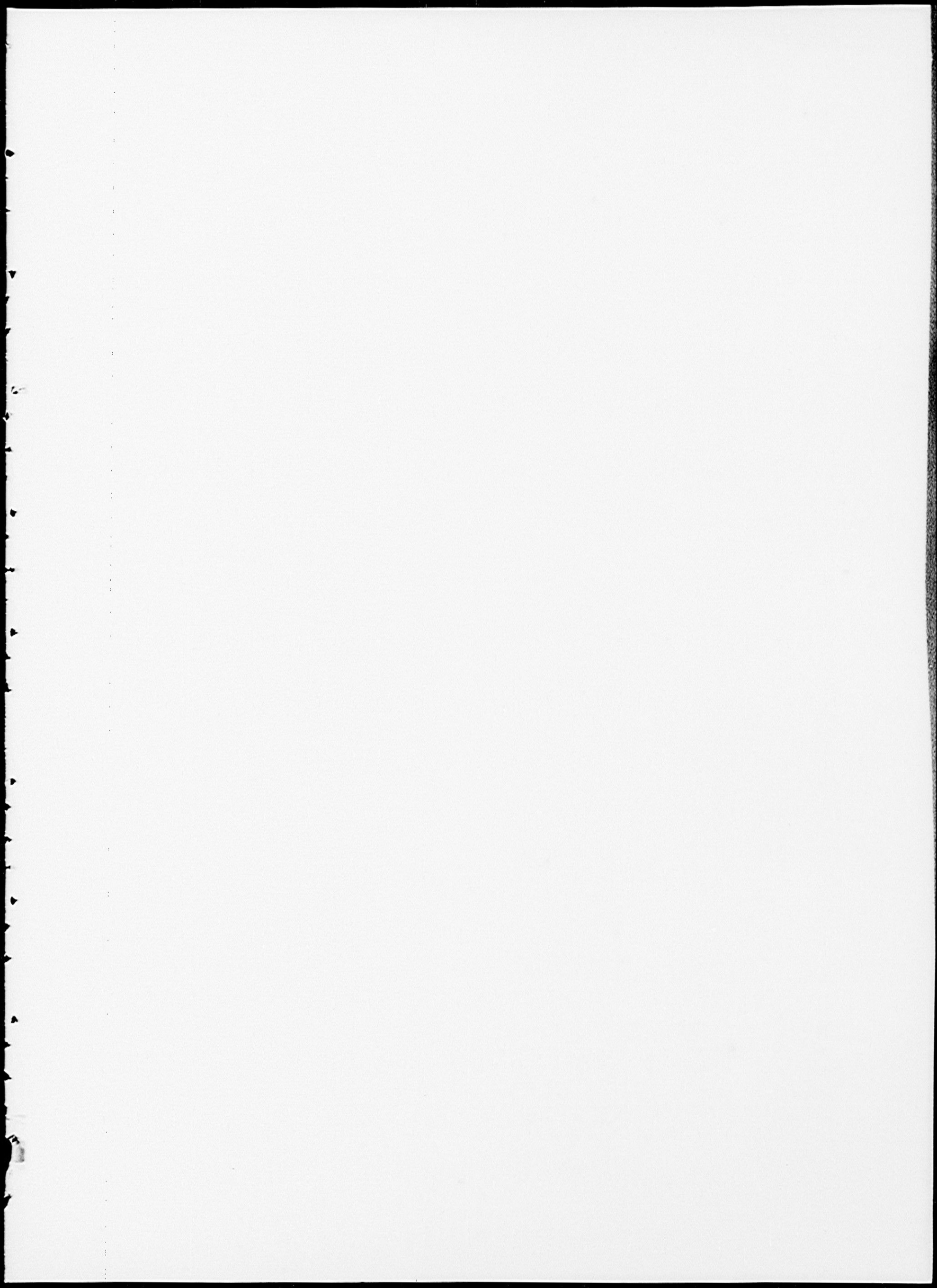
*Joseph W. Stewart*  
**CLERK**

**v.**  
**JOSEPH V. DILLON,**  
and  
**LOIS B. DILLON,**  
**Appellees**

**APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**Stephen G. Ingham**  
**626 Southern Building**  
**Washington 5, D. C.**  
**Attorney for Appellants**





(i)

No. 13,196

**APPELLANTS' STATEMENT OF QUESTIONS PRESENTED**

The question is whether, in a suit asking for rescission of a contract for the sale of real estate, specific performance and damages, the Court may award both rescission and damages and whether, under the facts and law, either should have been awarded, since there was no allegation or proof of fraud or misrepresentation.



## INDEX

|                                                                                                 | <u>Page</u> |
|-------------------------------------------------------------------------------------------------|-------------|
| JURISDICTIONAL STATEMENT . . . . .                                                              | 1           |
| STATEMENT OF CASE . . . . .                                                                     | 2           |
| STATEMENT OF POINTS . . . . .                                                                   | 3           |
| SUMMARY OF ARGUMENT . . . . .                                                                   | 3           |
| ARGUMENT . . . . .                                                                              | 4           |
| 1. Election of remedy should have been made . . . . .                                           | 4           |
| 2. There were no grounds to support a rescission of the contract . . . . .                      | 4           |
| 3. Appellees' conduct was inconsistent with a claim for rescission . . . . .                    | 7           |
| 4. Rescission would require restoration of the parties to their<br>original positions . . . . . | 7           |
| 5. Neither rescission nor damages should have been allowed . . . . .                            | 8           |
| 6. The sole issue should have been the escrow agreement . . . . .                               | 11          |
| CONCLUSION . . . . .                                                                            | 11          |
| TABLE OF CASES                                                                                  |             |
| Adams-Mitchell Co. v. Cambridge Distributing Co., 189 F.2d 913 (CCA 2) . . . . .                | 8           |
| Berger v. Murkoff, 200 Md. 561, 92 A.2d 376 . . . . .                                           | 8           |
| Building Co. v. Mensor, 120 Cal. App. 485, 8 P. 2d 171 . . . . .                                | 8           |
| Farnsworth v. Duffner, 142 U.S. 43, 12 S. Ct. 164 . . . . .                                     | 5           |
| Graham v. Atchinson T. & S.F. Ry., 176 F.2d 819 (CCA 9) . . . . .                               | 8           |
| Hennessy v. Bacon, 137 U.S. 78, 11 S. Ct. 17 . . . . .                                          | 7           |
| Horning v. Ferguson, No. 472 MCA, 52 A. 2d 116 . . . . .                                        | 5           |
| Jack Mann Chevrolet Co. v. Associates Investment Co., 125 F.2d 778<br>(CCA 6th) . . . . .       | 7           |
| Levin v. Cook, 186 Md. 535, 47 A.2d 505 . . . . .                                               | 6           |
| McNabb v. Thomas, 88 U.S. App. D.C. 379, 190 F.2d 608 . . . . .                                 | 5           |
| Power v. Orphanage, 148 Va. 331, 138 S.E. 637 . . . . .                                         | 10          |
| Ray v. Burice, 201 Md. 115, 93 A.2d 273 . . . . .                                               | 9           |
| Rosenthan v. Heft, 155 Md. 410, 142 A. 598 . . . . .                                            | 6           |
| U.S. v. Oregon Lumber Co., 260 U.S. 290 . . . . .                                               | 4           |
| Wyatt v. Madden, 59 App. D.C. 38, 32 F.2d 838 . . . . .                                         | 4           |
| STATUTE                                                                                         |             |
| 28 USC 1291, June 25, 1948 (62 Stat. 929) . . . . .                                             | 1           |



**UNITED STATES COURT OF APPEALS**  
**For The District Of Columbia Circuit**

---

**No. 13,196**

---

**DERMOT A. NEE,**  
**and**  
**ANTOINETTE K. NEE,**  
**Appellants**

**v.**

**JOSEPH V. DILLON,**  
**and**  
**LOIS B. DILLON,**  
**Appellees**

---

**APPEAL FROM THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF COLUMBIA**

---

**BRIEF FOR APPELLANTS**

---

**JURISDICTIONAL STATEMENT**

This is an appeal by Dermot A. Nee and Antoinette K. Nee, defendants in the Court below, from a judgment of the United States District Court for the District of Columbia in favor of the plaintiffs (appellees). The Court has jurisdiction to review the judgment under the provisions of Title 28, U.S.C., Section 1291.



## STATEMENT OF CASE

The appellees, Joseph V. Dillon and Lois B. Dillon filed a Complaint (J. A. 1) in which they asked for the following relief: (1) that a certain sales contract dated June 5, 1952, be rescinded, the purchase price paid for the property be returned and \$2, 500 damages; (2) that if rescission is not granted, the sellers (appellants) be required to specifically perform the terms of the contract; (3) damages in the sum of \$1, 000; and (4) that if rescission and specific performance are not granted, judgment for \$10, 000.

The appellants by their Answer and Counterclaim (J. A. 2-4) denied that the house, which was the subject matter of the contract, was not completed in a workmanlike manner and that there was a material deficiency in the ground and if, there were any deficiency, the same was waived by the appellees in accepting conveyance. The Counterclaim demanded payment to the appellants of a fund held in escrow by the Third-Party Defendant, Suburban Title and Investment Corporation (J. A. 8-9), who acts merely as escrow agent and is not a party to this appeal, and for the sum of \$176. 95 which is not in dispute.

At the trial in the Court below the following facts were developed, viz:

(a) That the appellants acquired the house at a foreclosure sale, at which time the house was ninety per cent completed.

(b) That the appellees became interested in the house through an agent, Paul Stone, inspected it and subsequently, on June 5, 1952, the parties executed a contract prepared by Stone, in which the appellants agreed to finish the house.

(c) Prior to the settlement of the contract on July 18, 1952, the appellees visited the house on several occasions and at the time of



settlement insisted that the sum of \$850 be held in escrow by the title company pending completion of six items (J. A. 29).

(d) There was a deficiency of footage in the lot between the amount set forth in the contract and the amount actually received according to survey (J. A. 18-19), which appellees saw before settlement (J. A. 41) however, the undisputed testimony of two expert witnesses introduced by the appellants was that such a shortage did not effect the value of the house and the lot upon which it was situated.

(e) No evidence was introduced by the appellees that there was fraud or misrepresentation on the part of appellants nor were any warranties, written or verbal, made by appellants as to size of the lot or a waterproof basement or roof, the principal complaints of the appellees.

(f) The Court below in its Memorandum (J. A. 9-17) found for the appellees and awarded rescission and damages and denied relief on the Counterclaim.

### STATEMENT OF POINTS

The Court below erred in granting a rescission of the contract, in awarding damages to the appellees, in awarding the fund held in escrow to the appellees and in dismissing the Counterclaim.

### SUMMARY OF ARGUMENT

The Court below found for the appellees on inconsistent theories, namely, both rescission and damages, and where, under the facts and law, grounds for neither existed.



## ARGUMENT

### 1. Election Of Remedy Should Have Been Made.

Appellee (J. A. 2) has asked for either specific performance of rescission and, in addition, (J. A. 2) damages.

In the first instance, it is settled that although one may assert many claims, regardless of consistency, Rule 8 (e2) F. R. C. P., an election must be made as to which a claim for relief is predicated on. U.S. v. Oregon Lumber Co., 260 U.S. 290.

In the Complaint (J. A. 2) appellees demanded that the contract be rescinded and for damages, specific performance if rescission were not granted, damages, and damages if neither rescission nor specific performance were granted.

During the course of trial below, the appellees had still not elected the theory upon which they were asserting their claim, but continued to ask for rescission or specific performance (J. A. 55-57) and also for damages.

The Court below first erred in granting inconsistent relief; namely, both damages and rescission. Wyatt v. Madden, 59 App. D. C. 38, 32 F. 2d 838.

### 2. There Were No Grounds To Support A Rescission Of The Contract.

The contract involved in this proceeding (J. A. 25-26) covered the sale of improved real estate in Montgomery County, Maryland. The principal ground upon which appellees relied for a rescission of the contract was a shortage in the number of feet contained in the lot upon which the house was located.



Nowhere in the pleadings or in the evidence can it be found that the appellees have charged the appellants with misrepresentation or fraud as to the number of feet in the lot; the only complaint of the appellees is that they got less than the contract called for. This is not sufficient to support an action for rescission. Particularly is this true in this proceeding, where the evidence clearly showed that the appellees were purchasing a house on a fixed lot, that they inspected the property and saw exactly what they were buying. McNabb v. Thomas, 88 U.S. App. D.C. 379, 190 F.2d 608; Farnsworth v. Duffner, 142 U.S. 43, 12 S. Ct. 164; 35 L. ed. 931.

It should be borne in mind that appellees were buying a house ninety per cent completed, located on a fixed plot of land and further noted that the appellees introduced no evidence whatsoever pertaining to damages for the alleged shortage. If there were a shortage of ground, it is immaterial in light of the testimony of appellants' two expert witnesses, C. Arthur Slater, Jr. (J.A. 70, 71) and John R. Webster, (J.A. 79, 80) both of whom stated that there would be no decrease in the value of the property if there was a shortage of as much as 1,000 square feet. Under the Maryland and District laws, this is the true test of damage in such a case and here it was shown the appellees suffered no damage.

The case of Horning v. Ferguson, No. 472 MCA, 52 A. 2d 116, fully supports appellants' contention:

"This leaves for consideration the question of the measure of damages. The effect of the court's ruling was ostensibly to award damages measured by what is usually called 'loss of the bargain,' that is to say, the value of the property he expected to get under the representations of the agent but did not receive under the written contract. Even this value,



however, apparently is not represented by the judgment, first, because it is not clear from the evidence whether the \$2, 500 paid by plaintiff was for a strip with a frontage of 36. 6 feet or for one 30 feet wide; and, second, because it appears that the price was that paid in 1945, nearly three years after the transaction between the parties. More important, however, such is not the measure of damages either in the District of Columbia nor in Maryland, both of which jurisdictions adhere to the principle laid down by the United States Supreme Court in *Smith v. Bolles*, 132 U.S. 125, 10 S. Ct. 39, 33 L. Ed. 279, and *Sigafus v. Porter*, 179 U.S. 116, 21 S. Ct. 34, 45 L. Ed. 113, that the measure of damages in cases of deceit includes only the direct consequences of the false representations; in other words, in contracts for the sale of property the amount recoverable is the difference between the amount paid and the market value of the thing acquired. This is the correct rule which should have been applied in this case. "

One further point on the alleged shortage is that under the line of authorities in Maryland the rule is that upon execution and acceptance of the deed, the prior contract of sale becomes null and void and the rights and remedies of the parties are to be determined by the deed. Levin v. Cook, 186 Md. 535, 47 A. 2d 505; Rosenthal v. Heft, 155 Md. 410, 142 A. 598.



3. Appellees' Conduct Was Inconsistent With  
A Claim For Rescission.

The contract between the parties was entered into on June 5, 1952, and settlement held at the title company on July 18, 1952. Appellees took possession of the house prior to settlement and were still in possession approximately sixteen months later when the Complaint was filed in the Court below and were in possession at the time of trial, where, as noted before, no firm election was made for rescission. The authorities hold that where one seeks a rescission, continuance in possession is repugnant to such a claim and that he must act promptly and give a clear notice of intention to rescind. Jack Mann Chevrolet Co. v. Associates Investment Co., 125 F.2d 778 (CCA 6th); Hennessy v. Bacon, 137 U.S. 78, 11 S. Ct. 17, 34 L. ed. 605. This is aside from the question of having fraud or misrepresentation present, which was not alleged or proved in the Court below.

In addition to the failure to surrender possession and offer to restore the parties to status quo, the appellees conduct, as disclosed by the record, was completely inconsistent with a claim for rescission. The appellees have made improvements about their home, expending money in improving or putting in a new driveway shortly before the trial below (J. A. 38), by the construction of a patio (J. A. 39), sodding the lawn in the rear of the house (J. A. 39), and painting (J. A. 38-39).

4. Rescission Would Require Restoration Of  
The Parties To Their Original Positions.

Had this been a case where rescission might have been proper, the Court below, in granting a rescission, would have further erred by failing to make any provision for the use and occupancy of the property by the appellees, a period in excess of three and one-half years. In case of rescission for fraud or misrepresentation, the purchaser in possession has a right to recover the purchase price paid subject to a



reduction to the extent of the value of his use and occupancy. Building Company v. Mensor, 120 Cal. App. 485, 8 P. 2d 171; Graham v. Atchinson T. & S. F. Ry., 176 F. 2d 819 (CCA 9); Adams-Mitchell Co. v. Cambridge Distributing Co., 189 F. 2d 913 (CCA 2).

5. Neither Rescission Nor Damages Should Have Been Allowed.

The appellees complained below that the house was not "finished" in accordance with the contract, specifically as to a roof leak (J. A. 38-39) and damage resulting therefrom, an allegedly wet basement (J. A. 35, 36), a defective driveway (J. A. 38), sodding (J. A. 38), and patio (J. A. 37-38).

The principal point stressed by the appellees is the alleged leaking condition of the basement. The evidence on this point was in sharp conflict with the appellants' witnesses, the builder, A. Arthur Muse (J.A. 73, 85-88), who also made a test the day of the trial, Moses Darby (J.A. 83, 84), John R. Webster (J.A. 79) and the appellants' builder (J.A. 75, 76) stating there was no leakage. However, this house was ninety per cent completed at the time the contract was entered into and the appellants made no warranties concerning the basement. The recent Maryland case of Berger v. Burkoff, 200 Md. 561, 92 A. 2d 376, governs in this case and relieves the appellants from any liability for the basement, as well as some of the other alleged defects complained of by the appellees; in that case, subsequent to execution of within contract for sale of house, vendors warranted basement to be dry and would remain dry; citing Williston, the Court held:

"The doctrine of caveat emptor so far as the title of personal property is concerned is very nearly abolished, but in the law of real estate it is still in full force . . . . Still more clearly there can be no warranty of quality or condition implied in the sale of real



estate and ordinarily there cannot be in the lease of it. "

Held there was no consideration for the alleged oral agreements.

"The general rule is that a promise to do, or actually doing that which a party to a contract is already under legal obligation to do, is not a valid consideration to support the promise of the other party to the contract to do additional work or to pay additional compensation for such performance. In other words, a promise by one party to a subsisting contract to the opposite party to prevent a breach of the contract on his part is without consideration. "

The case immediately set forth above also is authority for relieving the appellants from any liability for additional work promised but not provided for in the contract. The appellee admitted in his testimony that he did not agree to pay additional sums to the appellants for any extra work and, if any was promised, consideration therefor was wanting.

The rights and obligations of the parties are controlled by the contract, escrow agreement and the subsequent merger of these instruments in the deed. Were the items of work called for in the contract and escrow agreement completed? It is obvious that the appellee thought so, for by his letter of November 12, 1953, (J. A. 21-22) the appellee was completely silent about the previous complaints in the exchange of correspondence and wherein he raised three new items completely unrelated to the contract or escrow agreement. The case of Ray v. Burice, 201 Md. 115, 93 A. 2d 273, in dealing with a similar state of facts, held:

"The law is clear, absent fraud, duress or mutual mistake, that one having the capacity to understand a written document, who reads and signs it, or, without reading it



or having it read to him, signs it, is bound by his signature in law, at least. An integrated agreement may not be varied by parol where there is no mutual mistake, nor may the parties place their own interpretation on its meaning or intended meaning. "

"Next, if a contract has been integrated, it may not be varied by parol in the absence of mutual mistake, nor will it be rescinded or redrafted by the Court if one of the parties finds he has made a bad deal or has become dissatisfied with its provisions. "

The authorities cited above fully apply to the following points: sodding all of the lawn and making a patio — there was no consideration for this extra work and the appellants are not obligated in law to do the same; the alleged leak in the roof — appellants did not warrant the roof and, further, the undisputed testimony was that the roof did not leak until after appellees had possession and was caused by something beyond the control of the appellants; the driveway was not warranted by the appellants, nor was any warranty made as to balanced heat.

In Power v. Orphanage, 148 Va. 331, 138 S.E. 637, it was stated:

"The general doctrine of the law is that on the demise of a house or lands there is no covenant or warranty that the premises shall be fit and suitable for the use for which the lessee requires them, whether for habitation, occupation or cultivation, and consequently their unfitness for such purpose will not as a general rule justify the tenant in abandoning the premises, and on such grounds making defense to an action for rent. The tenant hires at his peril, and a rule similar to that of caveat emptor applies and throws upon the lessee the responsibility of examining as to the existence of defects in the premises and providing against their ill effects. "



This same rule is applicable to the purchaser of a house.

Again, the contract says that the house would be "finished" in a workmanlike manner. Except as to the driveway, which was finished by the appellants before appellees took possession, the basement, roof and heating plant had been constructed or installed by the original builder to appellants' obtaining the property through foreclosure sale. The undisputed testimony was that at the time of the contract between the parties the house was ninety per cent completed, the use of the word "finished" in the contract obviously refers to the completion of the remaining ten per cent on the house. Webster states that "finish" is "The joiner work and other fine work required for the completion of a building, especially of the interior."

**6. The Sole Issue Should Have Been The Escrow Agreement.**

At the time of settlement on July 18, 1952, the parties entered into an escrow agreement (J. A. 29) wherein \$850 was to be held in escrow pending completion of six items insisted upon by the appellees. It is the position of the appellants that the issue should have been confined to the escrow agreement. The question was whether or not appellants were entitled to the fund in escrow, plus the undisputed item of \$176.95 due them from the appellees, which the Court below also disallowed. The evidence (J. A. 21-22, 57-60) strongly indicates that all items were completed by appellants.

**CONCLUSION**

The appellants pray that the judgment below be reversed and that the case be remanded with instructions to enter judgment for appellants in the sum of \$1,026.95 and costs.

Respectfully submitted,

Stephen G. Ingham  
626 Southern Building  
Washington 5, D. C.

Attorney for Appellants







(i)  
INDEX

|                                                                                             | <u>Record<br/>Page</u> | <u>Appendix<br/>Page</u> |
|---------------------------------------------------------------------------------------------|------------------------|--------------------------|
| <b>PLEADINGS, DOCKET ENTRIES AND OTHER PAPERS:</b>                                          |                        |                          |
| Complaint . . . . .                                                                         | 256                    | 1                        |
| Answer and Counterclaim . . . . .                                                           | 260                    | 2                        |
| Exhibit A . . . . .                                                                         | 263                    | 4                        |
| Third-Party Complaint . . . . .                                                             | 264                    | 5                        |
| Answer to Counterclaim . . . . .                                                            | 266                    | 7                        |
| Answer of Third-Party Defendant, The Suburban Title and<br>Investment Corporation . . . . . | 268                    | 8                        |
| Memorandum by the Court . . . . .                                                           | 271                    | 9                        |
| Order and Decree . . . . .                                                                  | 281                    | 17                       |
| <b>EXHIBITS:</b>                                                                            |                        |                          |
| Defendants' Exhibit No. 1 . . . . .                                                         | 286                    | 18                       |
| Defendants' Exhibit No. 2 . . . . .                                                         | 287                    | 19                       |
| Defendants' Exhibit No. 3 . . . . .                                                         | 288                    | 20                       |
| Defendants' Exhibit No. 4 . . . . .                                                         | 290                    | 21                       |
| Defendants' Exhibit No. 5 . . . . .                                                         | 291                    | 22                       |
| Plaintiffs' Exhibit No. 1 . . . . .                                                         | 293                    | 25                       |
| and reverse side . . . . .                                                                  | 294                    | 26                       |
| Plaintiffs' Exhibit No. 2 . . . . .                                                         | 295                    | 27                       |
| Plaintiffs' Exhibit No. 6 . . . . .                                                         | 298                    | 30                       |
| <b>EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS:</b>                                             |                        |                          |
| <u>Witnesses</u>                                                                            |                        |                          |
| Joseph V. Dillon                                                                            |                        |                          |
| Direct . . . . .                                                                            | 5                      | 31                       |
| Cross . . . . .                                                                             | 32                     | 40                       |
| Anthony Merendino                                                                           |                        |                          |
| Direct . . . . .                                                                            | 50                     | 45                       |
| Cross . . . . .                                                                             | 54                     | 47                       |
| John E. Faigle                                                                              |                        |                          |
| Direct . . . . .                                                                            | 62                     | 50                       |
| Dermot A. Nee                                                                               |                        |                          |
| Direct . . . . .                                                                            | 68                     | 51                       |
| Cross . . . . .                                                                             | 92                     | 61                       |
| Wayne C. Greathouse                                                                         |                        |                          |
| Direct . . . . .                                                                            | 114                    | 64                       |



(ii)

## INDEX

Record  
Page

Appendix  
Page

**Witnesses--continued**

Edmund Duvall Harllee

|                 |   |   |   |   |   |   |   |   |   |   |   |   |            |           |
|-----------------|---|---|---|---|---|---|---|---|---|---|---|---|------------|-----------|
| <b>Direct</b>   | . | . | . | . | . | . | . | . | . | . | . | . | <b>128</b> | <b>66</b> |
| <b>Cross</b>    | . | . | . | . | . | . | . | . | . | . | . | . | <b>133</b> | <b>68</b> |
| <b>Redirect</b> | . | . | . | . | . | . | . | . | . | . | . | . | <b>135</b> | <b>69</b> |

C. Arthur Slater, Jr.

|                 |   |   |   |   |   |   |   |   |   |   |   |   |            |           |
|-----------------|---|---|---|---|---|---|---|---|---|---|---|---|------------|-----------|
| <b>Direct</b>   | . | . | . | . | . | . | . | . | . | . | . | . | <b>136</b> | <b>70</b> |
| <b>Cross</b>    | . | . | . | . | . | . | . | . | . | . | . | . | <b>138</b> | <b>71</b> |
| <b>Redirect</b> | . | . | . | . | . | . | . | . | . | . | . | . | <b>146</b> | <b>72</b> |

**Roger Allen Muse**

|               |   |   |   |   |   |   |   |   |   |   |   |   |            |           |
|---------------|---|---|---|---|---|---|---|---|---|---|---|---|------------|-----------|
| <b>Direct</b> | . | . | . | . | . | . | . | . | . | . | . | . | <b>150</b> | <b>73</b> |
| <b>Cross</b>  | . | . | . | . | . | . | . | . | . | . | . | . | <b>157</b> | <b>74</b> |

**Henry F. Kimball**

|               |   |   |   |   |   |   |   |   |   |   |   |   |            |           |
|---------------|---|---|---|---|---|---|---|---|---|---|---|---|------------|-----------|
| <b>Direct</b> | . | . | . | . | . | . | . | . | . | . | . | . | <b>183</b> | <b>75</b> |
| <b>Cross</b>  | . | . | . | . | . | . | . | . | . | . | . | . | <b>188</b> | <b>78</b> |

**John B. R. Webster**

[illegible]

## Moses Darby

|               |   |   |   |   |   |   |   |   |   |   |   |   |            |           |
|---------------|---|---|---|---|---|---|---|---|---|---|---|---|------------|-----------|
| <b>Direct</b> | . | . | . | . | . | . | . | . | . | . | . | . | <b>216</b> | <b>83</b> |
| <b>Cross</b>  | . | . | . | . | . | . | . | . | . | . | . | . | <b>220</b> | <b>85</b> |

**Roger Allen Muse**

[illegible]

## Beatrice Wilson

|               |   |   |   |   |   |   |   |   |   |   |   |   |            |           |
|---------------|---|---|---|---|---|---|---|---|---|---|---|---|------------|-----------|
| <b>Direct</b> | . | . | . | . | . | . | . | . | . | . | . | . | <b>239</b> | <b>91</b> |
| <b>Cross</b>  | . | . | . | . | . | . | . | . | . | . | . | . | <b>245</b> | <b>94</b> |



## JOINT APPENDIX

## PLEADINGS, DOCKET ENTRIES AND OTHER PAPERS

256 [Filed Nov. 17, 1953]

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIAJOSEPH V. DILLON  
1625 Eye St., N.W.  
Washington, D. C.

and

LOIS B. DILLON  
8511 Beech Tree Rd.  
Burning Tree Valley, Md.,  
Plaintiffs

v.

DERMOT A. NEE and  
ANTOINETTE K. NEE,  
Defendants

Civil Action No. 5305-53

## COMPLAINT

(Rescission, Specific Performance, Damages)

1. Plaintiffs and defendants are citizens of the United States. Plaintiff, Joseph V. Dillon, does business at 1625 Eye Street, N.W., Washington, D.C. Defendant, Dermot A. Nee, does business at 745 Seventh Street, N.W., Washington, D.C. The matter in controversy exceeds, exclusive of interests and costs, the sum of Three Thousand Dollars.

2. On June 5, 1952, plaintiffs and defendants entered into an agreement in writing, a copy of which is hereto annexed as Exhibit A.

3. In accordance with the provisions of said agreement, plaintiffs paid defendants the purchase price and defendants delivered to plaintiffs a house and lot.

4. The house and lot did not conform to the specifications of the agreement in that the house was completed in an unworkmanlike manner, and the lot contained a material deficiency of 1,528 square feet.

5. Plaintiffs have repeatedly demanded that defendants complete the terms of the contract, but defendants have failed to do so.



WHEREFORE, plaintiffs demand:

(1) That the aforesaid contract be rescinded and that defendants return to plaintiffs the purchase price, and \$2500, damages.

(2) That if rescission is not granted the defendants be required to specifically perform the terms of the contract.

257 (3) Damages in the sum of One Thousand Dollars.

(4) That if both rescission and specific performance are not granted, plaintiffs have judgment against defendants in the sum of Ten Thousand Dollars.

Plaintiffs by their Attorney:

DILLON AND DILLON  
1625 Eye Street, N. W.  
Washington 6, D. C.

By Joseph V. Dillon

260 [ Filed Jan. 4, 1954 ]

### ANSWER AND COUNTERCLAIM

#### First Defense

The Complaint fails to state a cause of action against the defendants upon which relief may be granted.

#### Second Defense

1. Defendants admit the allegations contained in paragraph one of the Complaint.

2. Defendants admit they and the plaintiffs entered into an agreement in writing on June 5, 1952.

3. Defendants admit they delivered a house and lot to plaintiffs in accordance with the provisions of said agreement, but deny that the plaintiffs have paid the purchase price therefor as alleged in paragraph three of the Complaint.

4. & 5. Defendants deny the allegations contained in paragraphs four and five of the Complaint.



### Third Defense

Defendants adopt by reference the allegations of paragraphs one, two and three of the Second Defense.

4. Defendants deny the allegations contained in paragraph four of the Complaint and aver that the house was completed in a workman-like manner and that there was no material deficiency in the size of the lot under the agreement between the parties. That although the sales  
261 contract between the parties stated the lot consisted of 39,495 square feet, prior to the settlement at the title company, defendants exhibited to plaintiffs a certified survey of the property, as of June 27, 1952, showing the lot actually to consist of 38,495.41 square feet; that with knowledge thereof plaintiffs took possession of the house and lot and on July 18, 1952, settled the contract, with the exception of the payment to the defendants of a balance due thereunder. Defendants are advised and believe that the plaintiffs waived any claim for a deficiency in the size of the lot and that by acceptance of a conveyance from the defendants effected a completion of the contract.

5. Defendants deny the allegations contained in paragraph five of the Complaint.

WHEREFORE, defendants demand judgment dismissing the Complaint and for their costs.

### **COUNTERCLAIM**

Defendants counterclaim against the plaintiffs as follows:

That on the 18th day of July, 1952, the contract between the parties was settled at the offices of the Suburban Title and Investment Corporation, at which time the sum of \$850.00 was withheld from the purchase price pending the completion of certain items of work provided for in a letter agreement dated July 18, 1952, a copy of which is attached hereto as Exhibit A and made a part hereof; that defendants fully completed said work and have made demand for the payment of said sum of \$850.00, but the plaintiffs have failed and neglected to pay the same, or to authorize the Suburban Title and Investment Corporation to release the same to defendants.



262 That subsequent to said settlement date, defendants, at the request of the plaintiffs, substituted the refrigerator and electric range in the house for other units selected by the plaintiffs, who agreed to pay the additional cost thereof amounting to \$176. 95; that defendants have demanded payment of said sum, but the plaintiffs have failed and neglected to pay the same.

WHEREFORE, defendants demand judgment against the plaintiffs as follows:

1. For the sum of \$850. 00 with interest thereon from August 15, 1952, and that an order be entered herein directing the plaintiffs to authorize the escrow agent, Suburban Title and Investment Corporation, to release the escrow fund of \$850. 00 to satisfy the principal of the judgment, and

2. For the sum of \$176. 95 with interest thereon from August 1, 1952, and costs.

/S/ Stephen G. Ingham

/S/ John J. Beatty, III  
Southern Building  
Attorneys for Defendants

Copy of the foregoing Answer and Counterclaim mailed, postage prepaid, this 4th day of January, 1954, to Dillon & Dillon, 1625 Eye St., N.W., attorneys for plaintiffs.

/S/ Stephen G. Ingham

263

-----  
Exhibit A

July 18, 1952

The Suburban Title and Investment Corp.

Washington, D. C.

Gentlemen:

In connection with the settlement of our purchase from Dermot A. Nee of Lot 4 and part of Lot 5, Block "A", "BURNING TREE VALLEY", in Montgomery County, Maryland, you are to withhold from the proceeds



due Mr. Nee the sum of \$850.00 in escrow, pending completion of the following items:

1. Surfacing of driveway to garage
2. Rolling lawn
3. Sodding remainder of lawn
4. Change and laying patio terrace
5. Turn around the present paving of Beech Tree Road
6. Addition of \$150.00 plantings and satisfactory rearrangement of shrubbery. Upon satisfactory completion of these items we will give you written instructions to disburse this money to Mr. Nee.

Very truly yours,

JOSEPH A. DILLON

Approved:

Dermot A. Nee

264 [ Filed Jan 21, 1954 ]

JOSEPH V. DILLON

and

LOIS B. Dillon

8511 Beach Tree Road

Bethesda, Maryland,

Plaintiffs

VS

DERMOT A. NEE, and

ANTOINETTE K. NEE

17 Primrose Street

Chevy Chase, Maryland,

Defendants and

Third-Party Plaintiffs

VS

SUBURBAN TITLE AND INVESTMENT CORP.

925-15th Street, N. W.

Washington, D. C.,

Third-Party Defendant

Civil Action No.  
5305-53

### THIRD-PARTY COMPLAINT

1. This Court has jurisdiction pursuant to the provisions of Rule



14 of the Federal Rules of Civil Procedure.

2. The plaintiffs have filed in this Court a Complaint against the defendants, a copy of which is attached hereto as Exhibit A.

3. The third-party defendant is a corporation engaged in business in the District of Columbia and is named a party to this action solely because it is escrow agent for funds arising out of the transactions between the plaintiffs and defendants alleged in paragraphs two and three of the Complaint.

4. That examination of the title to the real estate and settlement of the sales contract between the plaintiffs and the defendants was effected through the offices of the third-party defendant on the 18th day  
265 of July, 1952, at which time the parties designated the third-party defendant as escrow agent to withhold from the agreed purchase price the sum of \$850. 00, pending completion of certain items of work by the defendants. That all of the provisions of the escrow agreement and sales contract have been fulfilled in a satisfactory manner, but the third-party defendant has not disbursed to the defendants and third-party plaintiffs said escrow funds, although demand has been made therefor by the defendants. The third-party defendant claims that it cannot disburse said escrow funds until authorized to do so by the plaintiffs.

WHEREFORE, defendants and third-party plaintiffs demand judgment be entered authorizing and directing the third-party defendant to pay to them the sum of \$850. 00.

/S/ Stephen G. Ingham

/S/ John J. Beatty, III

Attorneys for Defendants and  
Third-Party Plaintiffs

---



266 [Filed Jan. 28, 1954]

JOSEPH V. DILLON and  
LOIS B. DILLON, Plaintiffs

VS

DERMOT A. NEE and  
ANTOINETTE K. NEE, Defendants

Civil Action No. 5305-53

### ANSWER TO COUNTERCLAIM

Plaintiffs deny that the contract between the parties was settled on the 18th day of July, 1952, or that said contract has been settled to date.

Plaintiff admits that on the 18th day of July, 1952, the parties met for settlement and at this time the sum of Eight Hundred and Fifth Dollars (\$850.00) was withheld from the purchase price pending the completion of certain items of work provided for in the letter of agreement dated July 18, 1952, copy of which is attached as an Exhibit to Defendant's Answer and Counterclaim. Plaintiffs deny that Defendants completed said work and although Plaintiffs have demanded completion, Defendant has refused and continues to refuse to complete said work as specified. Plaintiffs admit that Defendant substituted a refrigerator and electric range for the units in the house and that such substituted items were selected by Plaintiffs. Plaintiffs deny that they agreed to pay One Hundred Seventy-six Dollars and Ninety-five Cents (\$176.95) to Defendant. And Plaintiffs allege that any amount due Defendants on this transaction was subject to set-off by costs incurred by Plaintiffs by failure and refusal of Defendants to fulfill the terms of the contract of sale and the letter agreement of July 18, 1952.

WHEREFORE, Plaintiffs demand judgment dismissing the Counterclaim and their costs.

Respectfully submitted,

Plaintiffs by their Attorney:

DILLON AND DILLON

By Joseph V. Dillon



Copy of the foregoing Answer to Counterclaim mailed, postage prepaid, this 28th day of January, 1954, to John J. Beatty, III, Southern Building, Washington, D. C., Attorneys for Defendants.

/S/ Joseph V. Dillon

268 [Filed Jan. 30, 1954]

JOSEPH V. DILLON and  
LOIS B. DILLON, Plaintiffs

vs

DERMOT A NEE and  
ANTOINETTE K. NEE,  
Third-Party Plaintiffs

vs

SUBURBAN TITLE AND INVESTMENT CORP.  
Third-Party Defendant

Civil Action No.  
5305-53

**ANSWER OF THIRD-PARTY DEFENDANT, THE  
SUBURBAN TITLE AND INVESTMENT CORPORATION**

**TO THE HONORABLE, THE JUDGES OF THE ABOVE COURT:**

Now comes The Suburban Title and Investment Corporation, by William K. Copenhaver, its President, and for answer to the Bill of Complaint filed herein against it, submits to the Court as follows:-

1, 2 and 3. This Third-Party Defendant, The Suburban Title and Investment Corporation, admits the allegations contained in Paragraphs Nos. 1, 2 and 3 of said Bill of Complaint.

4. For answer to Paragraph No. 4 of said Bill of Complaint, this Third-Party Defendant admits the allegations contained therein, and, for further answer thereto, submits that it has held in escrow the sum of Eight Hundred and Fifth Dollars (\$850.00), subject to the letter of instructions from the Plaintiff, Joseph V. Dillon, and approved by the Defendant and Third-Party Plaintiff, Dermot A. Nee (a copy of which is attached hereto), that the said Third-Party Defendant has not received from the Plaintiff, Joseph V. Dillon, written instructions to release said



fund to the Defendant and Third-Party Plaintiff.

WHEREFORE, Having now answered said Bill of Complaint, the Third-Party Defendant says that it has no interest in said fund, and prays:-

269 1. That the Court adjudge which of the parties are entitled thereto, the Plaintiff or Defendant and Third-Party Plaintiff, and that the Court pass an Order directing the Third-Party Defendant to pay to party so adjudged entitled thereto; and

2. For such other and further relief as to the Court may seem just and proper.

Respectfully submitted,

THE SUBURBAN TITLE AND  
INVESTMENT CORPORATION

By William K. Copenhaver  
President

/S/ William E. Hutchinson  
Attorney for Third-Party Defendant

copy of above answer received

/S/ John J. Beatty, III  
Attorneys for Defendants and  
Third-Party Plaintiffs

Copy of above answer received

/S/ Joseph V. Dillon  
Attorneys for Plaintiffs

271 [Filed Dec. 13, 1955]

#### MEMORANDUM BY THE COURT

WILKIN, District Judge (By Designation):

This case is a sorry record of things amiss. It involves a contract and an escrow agreement for the sale of real estate. At the time the contract was signed, the residence on the real estate was unfinished. Prior to the contract, the property had been owned by A. Arthur Muse,



who was a witness. When the house which he was building was about 90% finished, he suffered physical and financial difficulties. He was confined in the hospital because of a severe heart ailment, and the mortgage on the lot and unfinished house was foreclosed.

272 The defendant Nee bought the property at foreclosure sale. Through the intervention of a real estate agent a contract of sale (Plaintiffs' Exhibit No. 1) was entered into by which the defendant Nee sold the property to plaintiffs. The contract was written on a form supplied by the real estate agent, and then there were added certain stipulations regarding the finishing of the house and other things to be done by the vendor. The careless and indefinite wording of the special stipulations indicates that the contract must have been drafted by the agent in a hurry to close the deal and collect his commissions. The wording of the contract is a discredit to the parties. Men of the standing and experience of the parties should have insisted upon a more carefully drafted and clearly stated agreement. That slipshod memorandum of agreement is the initial cause of the differences which led to litigation. <sup>(1)</sup>

Subsequent to the original contract, and after considerable controversy, another agreement was made (Plaintiffs' Exhibit No. 6), and \$850.00 was deposited with the defendant, Suburban Title and Investment Corporation, which the agreement provided should be paid to the defendant Nee when certain things mentioned in the escrow agreement had been completed. This second agreement was as indefinite in some particulars as the first.

The parties agree that the rights and responsibilities of the litigants should be determined by the terms of the two written agreements, but there is great disparity between the parties as to their interpretation. Construed in the light of the evidence, they indicate not so much an understanding as a misunderstanding of the parties. The evidence adduced at the trial fails to support completely the contentions of either party. Some of the language in the contracts is meaningless and the testimony fails to convince the Court as to what the intention of the parties was. The case submitted presents to the Court a house that was incomplete, two contracts



273 that were incomplete, and a trial that was incomplete. A contract of such importance should have been drafted by a disinterested lawyer. His services would have avoided future trouble and expense.

In spite of the indefiniteness and confusion, however, certain facts were established by the evidence. The Court is constrained to state those facts and then dispose of the case in accordance with such facts and the law.

The plaintiffs complained that defendant Nee had failed to comply with the original contract and the escrow agreement in the following particulars:

1. The land described in the deed was less than the amount provided for in the original contract.
2. The driveway was not completed in accordance with the contract.
3. The foundation walls of the house were not waterproofed in a workmanlike manner, as provided by the contract.
4. The lawn at the rear of the house was not sodded and the patio was not changed, as required by the escrow agreement.
5. The defendant failed to repair the damage to the walls by water from a defective roof.

The original contract called for 39,495 square feet of land. The deed described the land by metes and bounds and stated the area to be 37,967 square feet. The defendant called as a witness a surveyor who calculated the area according to the metes and bounds, and determined the amount of land described in the deed to be 38,495.41 square feet. The difference between the amount called for by the contract and the amount conveyed by the defendant, as figured by the defendant's own witness, is about 1,000 square feet. The defendant Nee contended that the figure in the contract was a typographical error. There was no  
274 evidence, however, to support that contention. The Court finds, therefore, that there was a variance of nearly 1,000 square feet between the amount of land called for by the contract and the amount delivered in the deed.



The defendant offered evidence tending to prove that the difference in the amount of land would not decrease the value of the property. The defendant also asserted that the plaintiffs, at the time of the escrow agreement, had waived or had accepted the land shortage.

The plaintiffs, however, testified that they did not see the deed until after the escrow agreement, and that as soon as they discovered the land shortage, they complained to the defendant and demanded that the deed convey an additional 1,000 square feet from adjoining property which the defendant owned at that time. The defendant ignored that demand and sold the adjoining property. An act which disables one from performing a contract is the same as repudiation of the contract. From the evidence the Court concludes that the shortage of land was never waived by the plaintiffs.

Because of the variance between contract and deed as to the amount of land, the plaintiffs pray "that the aforesaid contract be rescinded and that defendants return to plaintiffs the purchase price and \$2,500.00 damages." In view of the evidence and the findings of the Court, the plaintiffs' prayer for rescission must be granted. The amount of damages, however, must be determined by further considerations.

275 The plaintiffs' continued occupancy of the property after discovery of the shortage of land would preclude their right to rescission if it were not for the effect of the escrow agreement and the continuing negotiations for settlement. Because of the continuing efforts of the parties to settle their differences by negotiation and correspondence, the defendant is not in a position to object to the plaintiffs' occupancy of the land. Neither is the defendant justified in opposing rescission because the market value of the property would be slightly affected, if at all, by the shortage of land area. Anglo-American law places a distinct value on land. A contract for a definite acreage cannot be complied with by delivery of a substantially less acreage. Such a failure entitles a party to rescission. (2)

As to plaintiffs' claim for damages, the evidence reveals that plaintiffs spent \$685.13 for the installation of a properly constructed and



graded driveway. The Court finds from the evidence that such expenditure was justified, that it provided a permanent improvement to the property, and is an expenditure for which the plaintiffs are entitled to a refund.

As to the claim for sodding the rear lot and installation of the patio, the Court finds from the evidence that the original contract did not require sodding at the rear of the house. The escrow agreement, however, provided for "sodding remainder of lawn." The defendant contends that that expression means only the front lawn and side lawn, as provided for in the original contract. The evidence failed to clear up the difference. There was evidence moreover that subsequent to the making of the escrow agreement the plaintiffs agreed that the rear lot might be seeded instead of sodded, and the evidence was clear that grass seed was planted and produced a set of grass. The evidence indicated, however, that a storm washed out a great deal of the planted grass. That is a loss which entitles the plaintiffs to no recovery. They did not pay for the planting. As to the patio, the escrow agreement is too indefinite to be the basis of any claim for damages. Item 4 of that agreement evidently required the defendant to do something, and his failure to do anything constitutes a default, but the words of the contract afford no basis for assessment of damages because they do not indicate what should have been done. This misunderstanding serves as another reason for rescission.

The plaintiff testified that he paid \$287.00 for repair of damages incidental to the leaking roof. The evidence was clear that the defendant had the roof repaired at his own expense, but he declined to have the walls and ceilings repaired. This was done at plaintiffs' expense and constitutes a permanent improvement to the property for which plaintiffs are entitled to recovery.

The plaintiffs made no expenditure in order to have the basement made waterproof and, therefore, are entitled to no recovery. As to this claim for damages, since rescission is granted, there is no real necessity for further discussion. But in passing the Court will say that



in spite of violent differences of opinions regarding the source of the water in the basement, the Court was convinced from the evidence that most of the water entered the basement between the foundation walls and the footers or foundation. The most convincing testimony on this disputed point was given by the witness Beatrice Walker. She had served as maid in the house and said she saw the water coming in at the basement floor; had tried to mop it up, and finally had to move to an upstairs  
277 room to find dry footing.

The testimony of Muse, who built the house, was not convincing. He said parging of the basement walls had been done, and that the walls were waterproof, but he was not certain as to how the work had been done, and his financial and physical condition at the time creates a doubt as to the reliability of his testimony. His testimony as to where the water came from was mere opinion and cannot stand against the testimony of the maid and the plaintiff Dillon.

Although the evidence convinces the Court that the walls were not made waterproof, the contract does not indicate clearly who should bear the expense of waterproofing and installation of drain tile. The contract says "Entire house to be finished in all detail in a good and workmanlike manner." The plaintiffs contend that such statement obligated the vendor to make good any latent defect such as the leaking basement walls. The defendant contends that such statement obligated him merely to finish that part of the building which had not been completed, and that as to all other conditions, such as the basement walls, the plaintiffs accepted them as they were. The evidence does not reveal that there was any discussion of basement walls at the time the contract was made. The probability is that the defective walls were not known to the parties at the time of making the contract, and that the minds never met on that matter. It would seem from all the conditions and circumstances that the plaintiffs' contention has better justification since the plaintiffs were buying an unfinished house. It would be quite likely that they would provide in the contract for a house finished in all detail in a workmanlike manner and fit for the purpose of a home. Since the plaintiffs are granted



their prayer for rescission and they have made no expenditure regarding  
278 the basement walls, it is not necessary for the Court to determine  
the application of the words in the contract to the dispute regarding the  
basement walls.

The only other claim for damages is the expense of \$42.00 incurred  
by the plaintiffs "for the proper fitting of all doors." This also is a justi-  
fiable expense and an improvement to the property for which the plain-  
tiffs are entitled to refund.

The plaintiffs complained of other defective conditions which caused  
them inconvenience and annoyance, but made no specific claim for any  
amount of damages. Such inconveniences and annoyances as resulted  
from insufficient heat in one of the bedrooms, condensation and dripping  
from pipes, and other conditions, are offset by the rent-free use of the  
property which the plaintiffs had during the negotiations for settlement  
and the litigation.

The plaintiffs pray for alternative relief if rescission should not  
be granted. The mistake as to amount of land, the misunderstandings  
as to other matters, and the uncertainty of the written contracts, which  
justify rescission, make specific performance or other relief impossible.

Summarizing the damages allowed, the plaintiffs are entitled to judg-  
ment for \$1,014.18. Plaintiffs are also entitled to the \$850.00 deposited  
in escrow with the defendant, Suburban Title and Investment Corporation.  
The plaintiffs are also entitled to a refund of the purchase price paid to  
the defendant Nee, upon surrender by them to the defendant of the pos-  
session of the property and the execution and delivery to the defendant of  
a proper release and quitclaim in order to clear the title to the property  
279 in the name of the defendant.

All installations of appliances, equipment or furnishings made by  
the defendant should be surrendered to the defendant together with the  
real estate. Counterclaim of the defendants dismissed.

Judgment entry in favor of the plaintiffs, with costs, may be drafted  
in accordance with this opinion, and the opinion may serve as findings



of fact and conclusions of law.

/S/ R. Wilkin,  
U.S. District Judge

December 12, 1955.

NOTE (1): Plaintiff in his brief says, "It is granted that the provisions are written more like a reminder list than a set of detailed obligations." (Page 18)

NOTE (2): "It is a well-established equitable principle that where the injury caused by breach of contract is irreparable, or the damages that might be awarded would be inadequate, or difficult or impossible to determine, the injured party may resort to equity for rescission. This rule is particularly applicable in the case of the breach of a building or construction contract by the contractor's failure to perform in substantial compliance with the specifications."

9 American Jurisprudence, Sec. 28, p. 374.

"Cancellation is appropriate when there is an apparently valid written agreement or transaction embodied in writing, while in fact, by reason of a mistake of both or one of the parties, either no agreement at all has really been made, since the minds of both parties have failed to meet upon the same matters, or else the agreement or transaction is different, with respect to its subject-matter or terms, from that which was intended."

3 Pomeroy's Equity Jurisprudence, Sec. 870,  
page 383.

"A mistake on one side may be a ground for rescinding, but not for reforming a contract. Where the minds of the parties have not met there is no contract, and hence none to be rectified."

Moffett, Hodgkins & Co. v. Rochester, 178  
U.S. 373;



Dunn v. Dunn, 136 N. Y. S. 282;  
 Cullison v. Connor, 78 N. E. 14;  
 Hansford v. Chesapeake Coal Co., 22 W. Va. 70;  
 9 Corpus Juris, Sec. 4, p. 1159; Sec. 231, p. 1270;  
 and Sec. 222, p. 1266.  
 1 A. L. R. (2d) p. 9.

281 [Filed Dec. 21, 1955]

### ORDER AND DECREE

WILKIN, District Judge (By Designation):

In accord with Memorandum Opinion dated December 12, 1955, it is hereby ordered and decreed that:

1. Plaintiffs are entitled to judgment against defendant Nee for \$1,014.18.
2. Defendant, Suburban Title and Investment Corporation release to plaintiffs the sum of \$850.00 deposited in escrow with defendant, Suburban Title and Investment Corporation.
3. Defendant Nee will pay to plaintiffs the sum of \$43,970.80, the purchase price upon surrender by plaintiffs Dillon of the property and delivery to the defendant of a proper release and quitclaim in order to clear the title to the property in the name of the defendant.
- 282 4. Counterclaim of the defendants is dismissed.
5. Judgment is entered in favor of the plaintiffs, costs to be borne by defendants.

/S/ R. N. WILKIN  
 U.S. District Judge

December 21, 1955.

Seen:

/S/ Stephen G. Ingham,  
 Attorney for Defendants

Prepared by:  
 /S/ JOSEPH V. DILLON  
 Attorney for Plaintiffs



CA 530.5-53

**HOUSE LOCATION SURVEY  
LOT 4 & PART OF LOT 5 BLOCK A**

Dillon is free

Scale 1"=50'

**Montgomery County, Maryland**

**APRIL 5, 1951**

**THOMAS G. OYSTER AND ASSOCIATES**

11258 Georgia Avenue, Silver Spring, Md., Lockwood 5-1888

I hereby certify that the plat delineated hereon is a correct plat of Lot 4 & Part of Lot 5 Block A BURNING TREE VALLEY as same is shown on plat filed among the land records of Montgomery County, Maryland in Plat Book 36 on Plat 2466

That there are no encroachments from adjoining properties and that location of improvements shown is as determined by actual measurements made. April 4, 1951

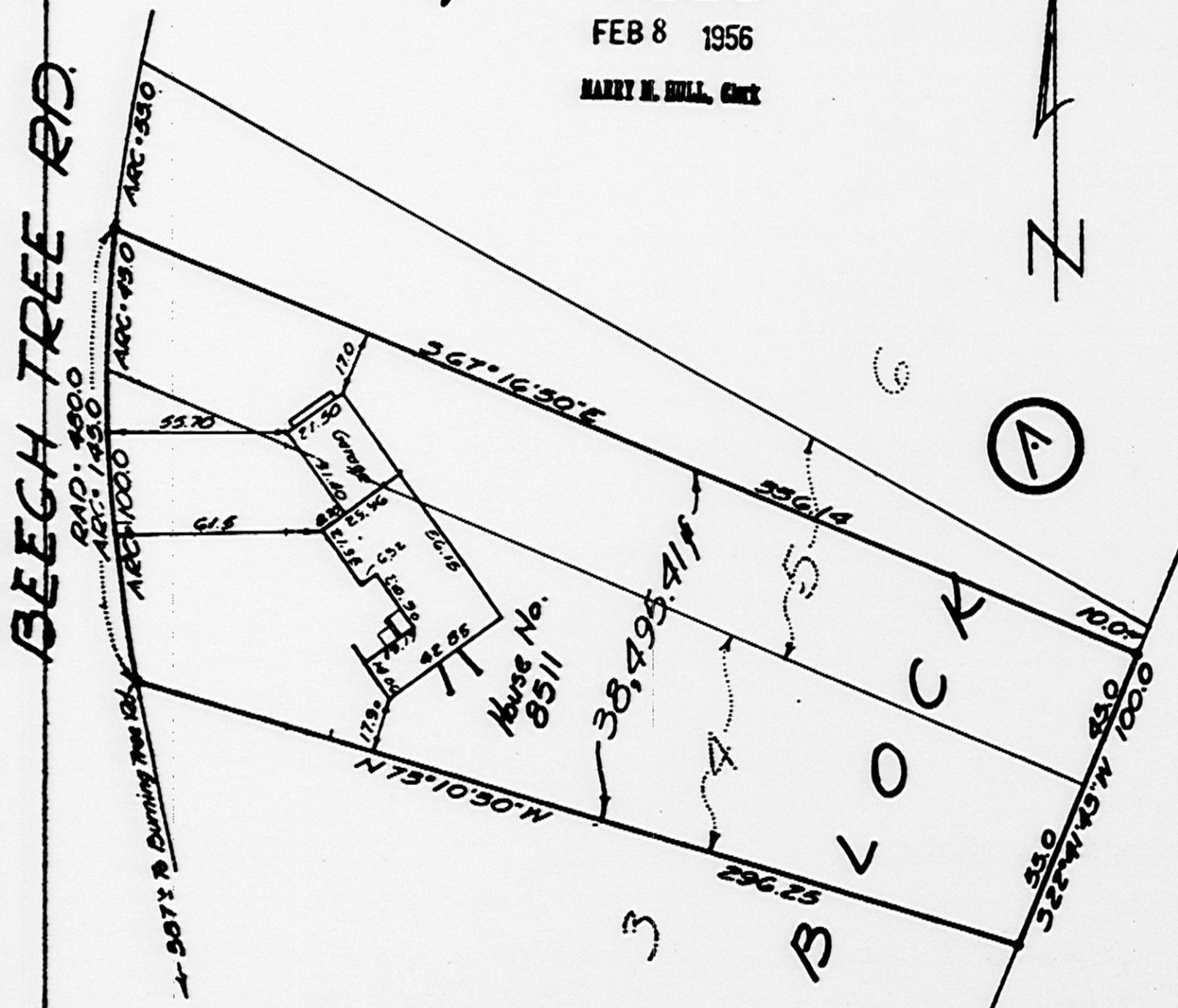
Certified correct as of June 27, 1952

Thomas E. Oyster  
REGISTERED LAND SURVEYOR, MARYLAND

Thomas B. Cystee **FILED**

**FEB 8 1956**

**HARRY M. BULL, Clerk**



1079-43 36  
L.C.R.

**BEST COPY AVAILABLE**

**from the original bound volume**



HOUSE LOCATION SURVEY  
LOT 4 & PART OF LOT 5 BLOCK A

CA 5305-53

Billon v. Noe

# BURNING TREE VALLEY FILE 1

Scale 1"=50'

Montgomery County, Maryland

APRIL 5, 1951

FEB 8 1956

THOMAS G. OYSTER AND ASSOCIATES  
11258 Georgia Avenue, Silver Spring, Md., Lockwood 5-1808

HARRY M. BULL, C.E.

I hereby certify that the plat delineated hereon is a correct plat of  
Lot 4 & Part of Lot 5 Block A BURNING TREE VALLEY as same  
is shown on plat filed among the land records of Montgomery County,  
Maryland in Plat Book 36 on Plat 2466

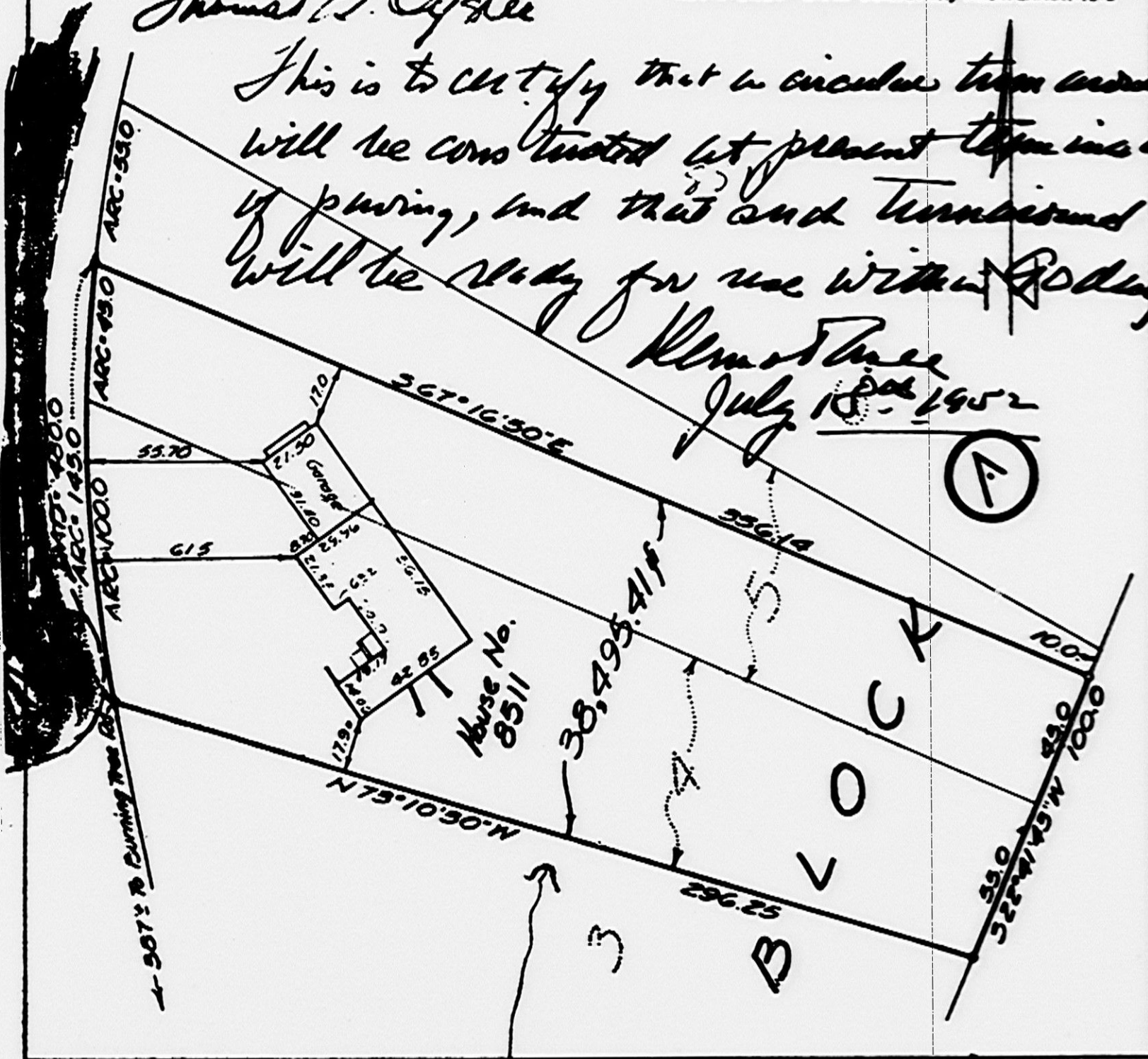
That there are no encroachments from adjoining properties and that  
location of improvements shown is as determined by actual measurements  
made. April 4, 1951

Certified correct as of June 27, 1952

Thomas G. Oyster

THOMAS G. OYSTER  
REGISTERED LAND SURVEYOR, MARYLAND 19173

This is to certify that a circular turn around  
will be constructed at present terminus  
of paving, and that such turn around  
will be ready for use within 90 days  
K. M. Oyster  
July 18, 1952



BEST COPY AVAILABLE

from the original bound volume



## Defendants' Exhibit No. 3

[ Filed Feb. 8, 1956 ]

8511 Beech Tree Road  
Bethesda 14, Maryland

October 7, 1952

288 Mr. Dermot A. Nee  
c/o P. J. Nee Company  
H Street at 7th, N.W.  
Washington 1, D. C.

Dear Mr. Nee:

By letter on 19 August, I outlined certain items which constituted failure on your part to fulfill your undertaking in accord with the provisions of the contract of sale there mentioned.

On 11 September, you replied to me by letter, stating that all the items were either completed or would be in the near future.

Treating the items in your letter in seriatim, may I inform you that:

Nothing has been done to improve the driveway;

The dishwasher, while installed, does not work, nor has any instruction been given regarding it;

The turn around has been completed satisfactorily;

The maid's room is in worse shape than before an attempt was made to repair it; moulding is removed and was scattered over floor - wall has been removed and not replaced. One sheet of wall has been left in my garage for more than six weeks and will probably be unfit for use. The finish on the remainder of the wall in the maid's room is essentially ruined. This has resulted in, and continues to be, a source of great expense and inconvenience to me, in that since occupancy, our maid refused to occupy the room. Transportation costs daily are excessive.

The next four items mentioned in your letter are correct

Item 11 of my letter of 19 August, calls for sodding the remainder of the lawn. I agreed to seeding subsequently. You report that the soil was enriched and seeded. I submit that by mere inspection, you can



determine that the soil was not prepared for seeding and as a consequence, less than 25 percent of the lawn has been grassed.

289 The missing parts for the bathroom fixtures have not been supplied.

Finally one more very serious latent deficiency now appears. The heating plant does not feed heat to one bedroom, nor to either outlet in the recreation room. In addition, the metallic noises of the plant in operation, resound throughout the entire house. I have notified the Columbia Specialty Company of this and they state that the former deficiency is due to lack of balancing which they can probably adjust but not within the service contract. They do not know if the noise feature can be eliminated. I am now calling upon you to have both of these defects corrected without delay.

Very truly yours,

J. V. DILLON  
Major General, U.S. Air Force

290 [Filed Feb. 8, 1956]

Defendants' Exhibit No. 4

8511 Beech Tree Road  
Bethesda 14, Maryland

November 12, 1952

Mr. Dermott Nee  
745 7th Street, N.W.  
Washington, D. C.

Dear Mr. Nee:

Responsive to your letter of November 5th, I should like to remind you that there are still a few matters left to be done prior to my authorizing the Suburban Title Company to release the amount of \$850.00 held in escrow.

The pile of trash and rubbish which were left at the end of my property was promised to be cleared. This is an eyesore and by comparison to the manner in which my neighbor's property was cleared,



suffers severely from an aesthetic viewpoint. Then there is the matter of the furnace and the balancing of heat. This has been long delayed and has caused some considerable discomfort. Finally, the checking of the electric switches by Harper has not been accomplished.

As soon as these three items are completed, I shall be pleased to notify the Suburban Title Company to release the amount held in escrow.

Very truly yours,

J. V. DILLON  
Major General, U.S. Air Force

---

Defendants' Exhibit No. 5

291 [Filed Feb. 8, 1956]

P. J. Nee Co.  
H Street at 7th, N.W.  
Washington 1, D.C.

December 7, 1953

Major General Joseph V. Dillon, U.S.A.F.  
8513 Beechtree Road,  
Burning Tree Valley,  
Bethesda, Maryland

Dear Sir:

Having heard nothing from you nor the Suburban Title Company about the release of my money, I must assume that the only means by which I can require you to pay me what is due me is through court action, which as you know, I am loathe to take.

However, before embarking on this legal case against you of which the results appear to be certain, I am taking this last opportunity of presenting my case to your superiors in the Air Force as well as the Secretary for Air.

The following items will be the subject of my complaint:

a. You violated a gentlemen's agreement in the matter of accepting title, when to have kept your word would have not effected you but



would have greatly helped me.

b. You arrogantly moved into the property without having first made settlement, even though you were told not to move in. You also 'horsed around' in the matter of settlement and put off from day to day this very vital occasion, with no regard for the rights of others.

292 c. You made unfair demands at time of settlement, which because of your violation of your gentlemen's agreement referred to above, I was in no position to refuse.

d. After settlement, you continued to make similarly unfair demands holding up the escrow fund at the Title Company until these new and unfair demands would be met.

e. You had us change your refrigerator and stove and while you had told us you would pay the difference, you have not lived up to your promise .

In general, from start to finish, my dealings with you have been completely unsatisfactory and a pattern has become established which I believe the Air Forces must be interested in.

If you do not favor me, at once, with your check for the appliances and authroize release of the escrow fund, I shall arrange an appointment with the parties mentioned to discuss this case in whatever detail they wish.

Yours very truly,

Dermot A. Nee

---







SALES CONTRACT - MARYLAND

WILLIAM W. MOLLAN  
827 - 15TH STREET, N. W.  
WASHINGTON, D. C.

Law Reporter Blank No. 289  
100 FORM 10, D. C., GOVERNMENT, D. C.

June 5, 1952

Received from Maj. Gen. J. V. Dillon and wife  
a deposit of Eleven Thousand, Three Hundred Seventy Five Dollars (\$ 11,375.00)  
to be applied as part payment of the purchase of Lot 4 and pt. of 5 of Block of Burning Tree Valley, Lot 145 by 250, with  
improvements thereon known as No. \_\_\_\_\_

in the State of Maryland, upon the following terms of sale:

Total price of property Forty Two Thousand Seven Hundred Fifty  
Dollars (\$ 42,750.00).

The purchaser agrees to pay Twenty One Thousand Three Hundred Seventy Five  
Dollars (\$ 21,375.00)

cash at the date of conveyance, of which sum this deposit shall be a part.

The purchaser is to assume, give, place, take title subject to, a first deed of trust secured on  
the premises of Lot 4 and part of 5, plat of Burning Tree Valley being 145 ft on  
Beech Tree Road constituting 39,495 sq. ft.

Dollars (\$ 21,375.00)

due monthly, 1952, bearing interest at the rate of 4-3/4 per cent  
per annum, payable monthly

**FILED**

FEB 24 1956

**PERRY M. HOLL, CLERK**

The balance of deferred purchase money is to be secured by a deed of trust on said  
property, to be paid in monthly installments of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_)  
or more, including interest at the rate of \_\_\_\_\_ per centum per annum, each installment when so  
paid to be applied, first, to the payment of interest on the amount of principal remaining unpaid  
and the balance thereof credited to principal.

Trustees in all deeds of trust are to be named by the parties secured thereby.

The property is sold free of encumbrance except as aforesaid; title is to be good of record and in fact subject, however, to covenants,  
conditions and restrictions of record if any; otherwise said deposit is to be returned and sale declared off at the option of the purchaser,  
unless the defects are of such character that they may readily be remedied by legal action, but the seller and agent are hereby expressly  
released from all liability for damages by reason of any defect in the title. In case legal steps are necessary to perfect the title, such action  
must be taken by the seller promptly at his own expense, whereupon the time herein specified for full settlement by the purchaser will  
thereby be extended for the period necessary for such prompt action.

Rents, taxes, water rent, insurance and interest on existing encumbrances, if any, and operating charges are to be adjusted to the  
date of transfer. Taxes, general and special, are to be adjusted according to the certificate of taxes issued by the Treasurer of the  
County, except that assessments for improvements completed prior to the date hereof, whether assessment therefor has been levied or not,  
shall be paid by the seller or allowance made therefor at the time of transfer. If the property is serviced by the Washington Suburban  
Sanitary Commission, annual benefit charges of said Commission are to be adjusted to date of transfer and assumed thereafter by purchaser.

Examination of title, tax certificate, conveyancing, notary fees and all recording charges, including those for purchase money trust,  
if any, are to be at the cost of the purchaser; provided, however, that if upon examination the title should be found defective the seller  
hereby agrees to pay the cost of the examination of the title and also to pay to the agent herein a commission hereinafter provided for just  
as though the sale had actually been consummated and all the terms of this contract complied with.

Within 30 days from the date of acceptance hereof by the owner, or as soon thereafter as a report  
on the title can be secured if promptly ordered, the seller and purchaser are required and agree to make full settlement in accordance with  
the terms hereof. If the purchaser shall fail so to do, the deposit herein provided for may be forfeited at the option of the seller, in which  
event the purchaser shall be relieved from further liability hereunder, or without forfeiting the said deposit the seller may avail himself  
of any legal or equitable rights which he may have under this contract. In the event of the forfeiture of the deposit, the seller shall allow  
the agent one-half thereof as a compensation for his services to him.

Settlement is to be made at the office of Suburban Title Co  
(Name of Broker) W. W. Mollan

or at the Title Company searching the title, and deposit with the Title Company or with \_\_\_\_\_  
(Name of Broker)  
of the purchase money, the deed of conveyance for execution and such other papers as are required of either party by the terms of this  
contract shall be considered good and sufficient tender of performance of the terms hereof.

Seller agrees to execute the usual special warranty deed.

Property to be sold subject to an existing tenancy as follows: \_\_\_\_\_

Seller agrees to give possession at time of settlement, and in the event he shall fail so to do he shall become and be thereafter a tenant  
by the week of the purchaser and hereby waives all notice to quit and purchaser may proceed to recover possession of said premises under  
and by virtue of the provisions of the Laws of Maryland or by such proceedings as may be in use in like proceedings between landlord  
and tenant. (Strike one of the two foregoing sentences.)

The risk of loss or damage to said property by fire or other casualty until the deed of conveyance is recorded is assumed by the seller.

All notices of violations of local ordinances or requirements, issued by legal authority or prosecutions in any court on account thereof  
against or affecting the property at the date of the settlement of this contract shall be defended or complied with by the seller and the  
property conveyed free thereof. This provision shall survive the delivery of the deed hereunder, regardless of knowledge or notice of the  
same on the part of purchaser.

**W. W. Mollan**

The seller agrees to pay to 2,137.60  
(Name of Broker)

his agent, a commission amounting to \$ 2,137.60 and the Title Company, or the Real Estate Office, through  
which settlement is made is hereby authorized and directed to make deduction of the aforesaid commission from the proceeds of the sale  
and to make payment thereof to the said agent. Entire deposit to be held by OWNER  
until settlement hereunder is made. (Name of Broker)

The principals to this contract mutually agree that it shall be binding upon their respective heirs, executors, administrators or assigns.

This contract, made in triplicate, when ratified by the seller contains the final and entire agreement between the parties hereto and  
they shall not be bound by any terms, conditions, statements or representations, oral or written, not herein contained.

**BEST COPY AVAILABLE**

from the original bound volume



Pltf. Ex. #1 (reverse side)  
Record page 294

Made and Sold by Law Reporter Pub. Co., 515 5th St., Wash., D.C.

# Sale Contract

MAINTAIN

REAL ESTATE

BETWEEN

AND

Purchaser

Owner

, 19

Entire house to be finished in all detail in a good and workmanlike manner, within 45 days from the date of this contract. Colors of paint, appropriate carpeting from wall to wall in the dining and living rooms and hallway. Same to include draperies and the same is not to exceed \$500 wholesale. Dining room to get crystal chandelier, living room fireplace is to have wood shelf to be placed as a mantle and mirror from mantle to ceiling. All windows, other than dining room and living room are to have venetian blinds. Dining room and living room floors are not to be scraped or finished. Electric range C 31. Refrigerator L. 11 J, both G.E. Linoleum A grade. Maid's room to be built with cellatex or equal, floored with Mantle also Recreation Room. Bookshelves along west wall under window and along sides thereof to ceiling. Pine to be stained and varnished to suit purchaser. Balance of basement floors to be painted or rubber base paint. Screens on all first floor windows and doors. Aluminum screen door on the front. Also screens for Recreation Room. Catch Basin for drain in front of house. Grade thereto and tile away. Flag Stone walk in sod from front walk to a flag stone patio at entrance of recreation room. Driveway to be of Bituminous products. Entire front yard to be sodded and 10' around sides and rear of house. Allotment of \$160 for Shrubbery spent at owners discretion. Two Hundred and Fifty Dollars is included within the price is for a 1000 gal. oil tank in lieu of the present 275 gal tank.

We, the undersigned, hereby ratify, accept and agree to the above memorandum of sale and acknowledge it to be our contract.

\_\_\_\_\_, 1952

\_\_\_\_\_, 1952

J. C. Diller  
Purchaser

Alvin J. Diller  
Seller

Ann Marie Diller  
Wife of Seller

Property is to be conveyed in the name of \_\_\_\_\_

**FILED**

FEB 24 1956

HARRY M. HOLL, CLERK

**BEST COPY AVAILABLE**

from the original bound volume



295 [ Filed Feb. 24, Plaintiffs' Exhibit No. 2  
1956 ]

Recorded July 30th, 1952 LIBER 1690 FOLIO 202 Case No. 19-323 jt  
at 2:50 P. M.

### THIS DEED

Made this 18th day of July, 1952, by and between DERMOT A. NEE AND ANTOINETTE R. NEE, HIS WIFE, parties hereto of the first part, and JOSEPH V. DILLON AND LOIS B. DILLON, HIS WIFE, parties hereto of the second part:

Witnesseth, that in consideration of the sum of Ten (10) dollars lawful money of the United States, the receipt of which is hereby acknowledged, the said parties of the first part do grant and convey unto the said parties of the second part, in fee simple as TENANTS BY THE ENTIRETY, all those pieces or parcels of ground, with the improvements, easements and appurtenances thereunto belonging, situate, lying and being in the County of Montgomery, State of Maryland, and being described as follows, to wit:

All of Lot numbered Four (4) and Part of Lot numbered Five (5), in Block lettered "A", in a subdivision known as "BURNING TREE VALLEY"; as per plat recorded in Plat Book No. 36, plat 2466, one of the Land Records for said Montgomery County, described in one parcel, according to plat prepared by American Topographic Engineers, as follows:-

BEGINNING at a point at the front common lot corners of Lots 3 and 4, in said Block, and running thence with the dividing line between said Lots 3 and 4, South 73 degrees 10 minutes 30 seconds East 296.25 feet to the end thereof; thence with the rear line of said Lot 4, and part of the rear line of said Lot 5, North 22 degrees 41 minutes 43 seconds East 100 feet; thence crossing said Lot 5, North 67 degrees 16 minutes 50 seconds West 356.14 feet to a point on the East line of Beech Tree Road; thence bounding thereon along the arc of a curve to the left, having a radius of 480 feet, an arc distance of 145 feet to the place of beginning; containing a calculated area of 37,967 square feet of land;



SUBJECT to a 60 foot easement along the East boundary of said property for water drainage, as shown on said recorded plat;

SUBJECT to covenants of record.

296 To Have and to Hold the said pieces or parcels of ground and premises above described or mentioned, and hereby intended to be conveyed, together with the rights, privileges, appurtenances, and advantages thereto belonging or appertaining unto and to the only proper use, benefit and behoof forever of the said parties of the second part, as Tenants by the Entirety, the survivor of them, his or her heirs and assigns, in fee simple; [Revenue Stamps]

And the said parties of the first part covenant that they will warrant specially the property hereby conveyed; and that they will execute such further assurances of said land as may be requisite.

Witness their hands and seals.

TEST:

E. DUVALL HARLLEE

DERMOT A. NEE (SEAL)

ANTOINETTE R. NEE (SEAL)

# DEED

297 [Filed Feb. 24, 1956]

Paid 1952 Jul 30PM 2:50

Jul 30, 1952

From

I Hereby Certify that all public taxes assessments and charges have been paid on said property to the county through the levy year of 1951....

Dermot A. Nee  
Antoinette R. Nee

To

Joseph V. Dillon, et ux  
Lois B. Dillon

This certification does not Guarantee Satisfaction of outstanding Tax Sales

Dept. of Finance  
Montgomery Co. Md.

by P. Gusbert







## Plaintiffs' Exhibit No. 6

298 [Filed Feb. 24, 1956]

July 18, 1952

The Suburban Title and Investment Corporation

Washington, D. C.

Gentlemen:

In connection with the settlement of our purchase from Dermot A. Nee of Lot 4 and part of Lot 5, Block "A", "BURNING TREE VALLEY", in Montgomery County, Maryland, you are to withhold from the proceeds due Mr. Nee the sum of \$850.00 in escrow, pending completion of the following items:

1. Surfacing of driveway to garage
2. Rolling lawn
3. Sodding remainder of lawn
4. Change and laying patio terrace
5. Turn around at the end of the present paving of Beech Tree Road
6. Addition to \$150.00 of plantings and satisfactory rearrangement of shrubbery.

Upon satisfactory completion of these items we will give you written instructions to disburse this money to Mr. Nee.

Very truly yours,

Joseph A. Dillon

APPROVED:

Dermot A. Nee

---



[Filed Feb. 24, 1956]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

JOSEPH V. DILLON

and

LOIS B. DILLON,

Plaintiffs

v.

DERMOT A. NEE

and

ANTOINETTE K. NEE,

Defendants

Civil Action No. 5305-53

2

PROCEEDINGS

\* \* \* \* \*

Mr. Dillon: This case arose out of a contract of sale dated June 5, 1952, in which the defendants undertook to deliver a piece of land in Maryland, with an improvement thereon.

In addition to the contract of sale, there was an addendum to that contract at the closing, which took place at the Suburban Title Company on July 18th.

At the time that the deed was delivered, there was a variance in the amount of land delivered, amounting to 1,528 feet.

3

The defendant was called upon to rectify this. He was in a position to do so at the time, owning the contiguous land.

In the addendum he undertook to do some additional matter that was not in the original contract of sale, all of which I propose to show he failed to do satisfactorily; not all of which, but some of which he failed to do satisfactorily. That is our case.

Your Honor, in this case I am counsel pro se, but I am the first witness for the plaintiff, and my associate, Mr. Walter Dillon, will make the examination.

\* \* \* \* \*

Mr. Ingham: I will make it very brief, your Honor.

In the first instance, the position of the defendant is, he complied fully with the terms of the contract between he and the plaintiff. We deny that there is any material shortage in the ground area that was







purchased, and if it is found that there was some shortage, that the value of the property was not affected in any way by that shortage.

4 In addition to the defense or denial of any obligation from defendant to the plaintiff, the defendant has a cross claim against the plaintiff for the sum of \$850, representing funds that were held in escrow at the title company, at settlement. In addition to that, there was some \$176 and some-odd cents, representing the differential of the cost of a refrigerator and range substituted in the house at the request of the plaintiff, and we are asking judgment on account then in that amount.

\* \* \* \* \*

5 JOSEPH V. DILLON

a plaintiff, called as a witness in his own behalf, and having first been duly sworn, took the stand, and was examined and testified as follows:

#### DIRECTION EXAMINATION

By Mr. Walter Dillon:

Q. General Dillon, were you a party to a contract of sale with Mr. Dermot Nee? A. I was.

6 Q. What was the date of this contract? A. June 5, 1952.

\* \* \* \* \*

The Court: I take it there is no dispute about it, and it may be marked Plaintiffs' Exhibit 1 and received in evidence.

\* \* \* \* \*

7 By Mr. Walter Dillon: \* \* \*

A. "First deed of trust secured on the premises of Lot 4 and part of 5, plat of Burning Tree Valley, being 145 feet deep on Beechtree Road, constituting 39,495 square feet."

Mr. Walter Dillon: Plaintiff offers this as Exhibit No. 1.

\* \* \* \* \*

Q. When and where was the closing on that contract? A. The closing on the contract was on July 18th, at the Suburban Title Company.

Q. Was the deed for the property delivered to you at that time?  
A. No, there was no deed delivered or, to my knowledge, displayed. I insisted upon a title guarantee, free of all encumbrances, and the



title company had not prepared in that manner. They said they would so prepare it and have it recorded and delivered to me.

8 Q. When was it delivered to you? A. Sometime after the date of recording, which was on July 30, 1952.

Q. Do you have a copy of that deed? A. I have a copy of the deed.

Mr. Walter Dillon: Plaintiff offers for identification this, as Plaintiffs' Exhibit No. 2.

(Deed, dated 7/18/52, was marked by the Deputy Clerk as Plaintiffs' Exhibit No. 2, for identification.)

\* \* \* \* \*

A. "All of the lot numbered four (4) and part of lot numberd five (5) in block lettered A, in a subdivision known as Burning Tree Valley, as per plat recorded in plat book No. 36, plat 2466, one of the land records for said Montgomery County, described in one parcel, according to the plat prepared by American Topographical Engineers, as follows: Beginning at a point at the front common lot corners of Lots 3 and 4 in said block, and running thence with the dividing line between said Lots 3 and 4 south 73 degrees 10 minutes 30 seconds, east 296.25 feet to the end thereof; thence with the rear line of said lot 4 and part of the rear line of said lot 5 north 22 degrees, 41 minutes, 43 seconds east 100 feet; 9 thence crossing said lot 5 north 67 degrees, 16 minutes, 50 seconds west 356.14 feet to a point on the east line of Beechtree road; thence by bounding thereon along the arc of a curve to the left, having a radius of 480 feet, an arc distance of 145 feet to the place of beginning; containing a calculated area of 37,967 square feet of land."

Q. Is that a variance between the description of the land in this deed and the description you have just read, of the contract of sale?

A. Yes, there is a variance of 1,520 feet.

\* \* \* \* \*

Q. What, if anything, did you do when you noted the variance?

A. I notified Mr. Nee and he indicated he would make it good.

Q. Could he have made it good at that time? A. Yes, he owned the contiguous land, and I felt that all that would be needed to rectify the



10 error was to give me 5 feet at the rear end of the lot and not change the front, but run that 5 foot line right to the commencement point on the front. That would have been about 1, 528 feet.

Q. And that land in the rear he did own at that time? A. He did.

Q. Did he make the requested conveyance? A. No, but I felt that it would take some time to have a survey, and I felt that he was going to do it.

Q. But he did not do it? A. No, he never did it.

Q. When did you next take action? A. Well, during this period there were a number of defects which engaged me, but my next official notification to Mr. Nee was through his first attorney, sometime about the end of December. His attorney wrote me and told me that he was going to institute suit for the release of the \$850 which was held in escrow.

\* \* \* \* \*

12 By Mr. Walter Dillon:

Q. Did you receive a reply to your letter? A. There is nothing that I recall, outside of some telephone calls with Mr. Nee, until February 9th, when a second attorney of Mr. Nee wrote me a letter stating that he was instructed by Mr. Nee to institute suit against me.

Q. Do you have the original copy of that letter? A. I do.

Mr. Walter Dillon: Plaintiff offers for identification this letter, to be marked as Plaintiffs' Exhibit No. 4.

(Original letter from Meatyard & Carlin to plaintiff, dated 2/9/53, was marked by the Deputy Clerk as Plaintiffs' Exhibit No. 4 for identification.)

\* \* \* \* \*

14 A. In the letter of March 2nd, addressed to Mr. Nee at his Seventh and H Street office:

"Responsive to yours of 25 February, you may inform your attorney that I am prepared to have the entire matter of the contract of sale of my house adjudicated before the appropriate Court of law, which course was chosen by you in your previous letter,



and please be informed that I am no longer concerned with what Columbia Specialty or others may have to say concerning your efforts to adjust the heating duct. I am concerned only with the fact that they are not and never have been adjusted. You have been repeatedly advised regarding the other failures. "

\* \* \* \* \*

15 "You have been repeatedly advised regarding the other failures on your part of the contract, with particular reference to the leaking foundation and flooded well pit, as well as the variance of a substantial amount of ground between the contract of sale and the delivered deed. Your failure to rectify these matters convinces me that the matter will only be settled satisfactorily in a Court of law.

\* \* \* \* \*

16 Mr. Walter Dillon: Plaintiff submits this as Exhibit 5.

(Original letter, defendant to plaintiff, dated 6/12/53, was marked by the Deputy Clerk as Plaintiffs' Exhibit No. 5, for identification.)

\* \* \* \* \*

17 The Witness: (Reading)

"I want to give you all that you bought, and more besides, and if I have failed, and I know that you have addressed yourself accordingly, I would like to have an opportunity now to make things right. "

\* \* \* \* \*

The Witness: I did reply to that letter, accepting the apology, and then waited for him to give me all that I bought.

By Mr. Walter Dillon:

Q. What occurred subsequent to that time? A. Nothing happened until along about November or December of 1953, when it became apparent to me that Mr. Nee did not intend to do anything, and I became aware of the passing of time and the loss of rights possible because of the passage of time, so at that time I instituted suit.



\* \* \* \* \*

18 The Court: Received.

(Addendum to contract of sale, being dated 7/18/52, was marked by the Deputy Clerk as Plaintiffs' Exhibit No. 6, and received in evidence.)

By Mr. Walter Dillon: \* \* \*

19 A. Yes, and I would say that as soon as they became apparent to me, I notified Mr. Nee and asked him to repair them. Shortly after moving into the house, we had a rainstorm which manifested what I regarded as completion in an unworkmanlike manner.

First, the basement was leaking all around its base, particularly in the recreation room, the maid's room, even before the storm. It had a thick scum on the wallboard which constituted the walls of the room.

The Court: Just a minute.

Mr. Ingham: I don't like to interrupt plaintiff, since he is counsel as well as plaintiff, but it appears to me that his testimony now is not responsive to the question.

The question, as I gathered it, was: What item to that addendum to the contract, or items, were not completed?

Now, there is nothing in the addendum to the contract with reference to the maid's room or basement walls, such as he is testifying to now.

The Court: It all goes back to the phrase "unworkmanlike manner," I presume. Am I correct?

Mr. Walter Dillon: I believe that's the testimony. The witness testified that he began to describe the items that were completed in an  
20 unworkmanlike manner, and he mentioned the addendum as part of those, as containing some of the items completed in that fashion.

\* \* \* \* \*

The Court: I will read from Exhibit 1:

"Entire house to be finished in all details in a good and workmanlike manner," and so forth.



\* \* \* \* \*

21 By Mr. Walter Dillon: \* \* \*

A. \* \* \* I don't know that that was all the moisture that was in there, because there was a thick scum on the wallboard throughout the room, but it became completely unusable because of this drip through the Celotex ceiling onto the bed, and you couldn't place the bed in the room in any manner that it wouldn't get this drip.

22 Number two: The driveway to the garage, which is about a hundred-foot run from the roadway to the garage, when I arrived at the house, it was rutted, and at the first rainstorm there was a pool of water gathered, I would say 35 feet long and about three-quarters the width of the runway, which gathered there and had no drainage away, and I determined that it was due to poor surfacing and poor grading, and it was for that reason that in the addendum to the contract I asked that that be resurfaced, and Mr. Nee agreed to resurface, which would do away with that, not only that inconvenience and unsightliness, but a danger when it became cold, because that became ice.

The recreation room, as I say, the basement leaked, first manifested the leak in the recreation room badly, and then gradually the entire cellar, or the entire basement -- base wall leaked in every respect, so much so that under the wallboard in the maid's room, not only water came in, but mud actually came into that room, and has continued throughout the basement ever since.

I have had a number of people estimate the job, and it is quite an undertaking, which I think, and there will be witnesses to show that it was due to poor workmanship.

Mr. Ingham: If your Honor please, I object. If they have witnesses that can prove it, let them prove it, not a statement from the plaintiff.



\* \* \* \* \*

23 A. From the first time that the heat had to be put on, one bedroom, about a 15 by 15 bedroom, on the northwest exposure of the house, was 10 to 15 degrees colder, lower in temperature, than the remainder of the house. In other words, when we had the house at about 70, that room would be about 55.

I notified Mr. Nee and he did send some heating people out that attempted to balance, but never succeeded in rectifying it.

What happens is that the coldest exposure of our house, this room is exposed on three sides, with two picture windows, and has but one heating inlet. Every other room in the house has two heating inlets into the room, so all the heating people, it became apparent to me that it could not be accomplished with that one heating element, you could never balance the heat, and all the efforts to balance failed. Nobody has been able to balance the heat. That room is still, six months of the year, unlivable, unless you are a very hardy individual.

\* \* \* \* \*

A. Every door in the house, I suppose that is a concomitant with all new houses, but every door in the house was unfitted, either couldn't close the door, or if you closed it, the male part of the latch didn't meet the female, so that you couldn't lock it. That was so in both bathrooms. Every door in the house had to be refitted.

24 Q. Were there any defects in the lawn in the rear of the house?

A. Yes. That was observed before the closing agreement. The rear of the house, that part of it which is cleared, constitutes an area of about 30 feet or 35 feet by 100 feet. Mr. Nee sodded, in accordance with the contract of sale, 10 feet of that, but because of the unsightliness, it was just a mud heap beyond the 10 feet, at the closing agreement, in the addendum, Mr. Nee undertook to sod the remainder of the lawn, which was that area. There was also an area of about 5 feet on the northwest side of the front, that ran the entire length of the front lawn, which was



not reached in the sodding and was left unsodded.

Q. In the closing agreement, Plaintiff's Exhibit 6, the defendant refers to, in number four, "Change in laying patio terrace." Was that ever accomplished? A. That was never accomplished by Mr. Nee. I had that accomplished.

\* \* \* \* \*

Q. General, you have enumerated eight items which you have testified have either not been completed or completed, as you have testified, in an unworkmanlike manner. Have you had these items completed? A. Some of them I had completed, in the course of time, others, I haven't. I have had the driveway to the garage, because of the dangerous nature of it when freezing sets in, the pool became an ice pond, and it was dangerous backing out of the garage, and I had the entire driveway resurfaced and regraded, so that it is now satisfactory.

\* \* \* \* \*

Q. How about the heating unit? A. The heating unit, it has never been balanced, but the estimators tell me that while the furnace itself is over capacity, it could easily do it.

\* \* \* \* \*

The Witness: I have not had the heating completed. \* \* \*

At the first rainstorm, we had rain come in and spoil the finish in the bedroom, one wall of the living room. It broke the plaster and spoiled the finish. And in the bathroom, the bathroom, one bedroom, and one wall of the living room -- I have had that all completed. It was an unsightly mess.

Now, as to the leak in the roof, when I notified Mr. Nee, he did have that completed, and then when I asked him to have the damage caused by the leak repaired, that precipitated his employing an attorney, and he told me, in response to that letter, that he intended to have an attorney, he was not going to repair the damage caused by the leak in the roof. His responsibility ended, he claimed, with fixing the leak.



I have had that completed by Mr. R. L. McElfish, of Gaithersburg, Maryland, a painter who was employed on another project by me, and he completed the work for \$285.00. He is a journeyman painter and plasterer.

While the work that he did for me amounted to \$572.00, that included the painting of the kitchen and putting a screen, glass screen on a bath, which amounted to the difference between \$572.00 and \$285.00, which was directly attributable to the damage caused by the leak.

By Mr. Walter Dillon:

Q. Do you have a copy of his bill with you? A. He did not -- as I say, he is a journeyman painter and plasterer, didn't submit a bill, and I paid him by, I have two canceled checks to him. I paid him in two amounts for the job that he did.

Mr. Walter Dillon: Plaintiff submits these as Exhibits 7 and 8.

27 The Court: Are you marking them separately?

The Deputy Clerk: Yes, sir.

\* \* \* \* \*

28 The Witness: I also paid a Mr. Petrey, M. Petrey, \$48.28. He's a journeyman carpenter. For the fitting of the doors.

\* \* \* \* \*

29 The Witness: I also have had the rear lawn sodded and regraded. \*\*\*

\* \* \* \* \*

30 The Witness: \*\*\* I have a bill which I paid to Stock Nursery, amounting to \$800.06, for the construction of the patio, regrade and approximately sod 96 square yards, for a total of \$800.06.

Mr. Walter Dillon: Plaintiff offers that as Exhibit 10.

The Court: That is a bill, or statement of account?

The Witness: That is a restated bill.

(Restated bill of Stock Nursery, in the amount of \$800.06, dated 5/1/54, was marked by the Deputy Clerk as Plaintiffs' Exhibit No. 10, for identification.)



## CROSS EXAMINATION

By Mr. Ingham:

Q. General Dillon, referring you to the contract, Plaintiffs' Exhibit No. 1, do you recall who prepared that? A. I believe the agent, Mr. Stone, Mr. Paul Stone.

Q. Mr. Paul Stone? A. Yes.

Q. Do you know how he arrived at the figure of 39,495 square feet? A. No, I don't.

\* \* \* \* \*

Q. Did you first contact Mr. Stone, or did Mr. Nee? A. I don't know. I was looking at another house with Mr. Stone prior to the purchase of this.

Q. And did you call this particular house to Mr. Stone's attention? A. No, I think he called it to mine. In fact, I know he called it to mine.

33 Q. When did you first see this home? A. When did I first?

Q. First see it. A. See this house?

Q. Yes. A. I imagine it was sometime in May, though I don't know the exact date -- in May of 1952.

Q. After the first visit, in May, how many times did you go out to the home before your settlement in July of '52? A. Several times. I don't know how many.

\* \* \* \* \*

Q. Give us a more definite figure. Once a week, twice a week? A. Between the time I first saw it and the time that I moved in?

Q. Yes, sir. A. Oh, I would say once a week for the first -- until I signed the contract. Maybe I saw it two or three times before I signed the contract of sale. Thereafter, I would say I was out there between the date of the contract of sale and the time I moved in, I was out there three or four times. I don't know whether they were intervals, weekly intervals, or twice in one week; but it was three or four times.

\* \* \* \* \*



35 Q. Do you recall, either through your certificate of title insurance, or having been advised by a representative of the Suburban Title Company, that the only way it could be determined whether or not there was a variance of footage was for a new survey to be made? A. I had no conversation with anyone in Suburban Title regarding the shortage of footage. The only one with whom I dealt on the variance was Mr. Nee.

\* \* \* \* \*

Q. Now, the deed refers to a survey of the American Topographical Engineers. Have you seen any other survey of this property?

A. Yes, I have. I saw a survey made by a Mr. Oyster. I think.

36 Q. I show you this instrument which was marked at pre-trial as an exhibit, and ask whether or not that is the survey you saw (passing document to witness.) A. No, this is not what I saw. I saw one dated June 27, 1952, certified correct as of June 27, 1952.

Q. I show you that survey and ask whether or not that is the one you saw. A. Yes, I think this is the one I saw.

Q. Do you find any difference between these two surveys, other than the date of the certification? A. Yes, there is a note.

Q. Other than the note and the drawing, the actual survey itself, is there any differential? A. No, it appears to be the same. It appears to be the same.

Mr. Ingham: I offer this survey as Defendants' Exhibit No. 1, for identification.

The Court: Mark that as Defendants' Exhibit No. 1, for identification.

\* \* \* \* \*

38 By Mr. Ingham:

Q. General Dillon, referring you to Defendants' Exhibit No. 1 for identification, where did you see that survey? A. I think I saw it in Temporary L Building, where I then -- where I had my office. You mean where I first saw it?



Q. Yes. A. I first saw it, I think, there; although I don't know.

Q. Do you recall when that was? A. No. Whether it was before or after I moved into the house, I am not certain.

39 Q. What date did you move in the house? A. I think the day before the closing.

Q. In other words, you would have moved into it the 17th of July 1952; is that right? A. I think that's right.

Q. Do you recall the circumstances surrounding seeing this survey, who presented it to you? A. No, I don't recall, but I did -- I think the first time I noticed the variance was, between the contract of sale and this, and then of course, I wasn't concerned, because this was not, did not represent what I was getting; the deed, I thought, represented what was conveyed to me.

Q. At that time you saw a discrepancy or differential of exactly 1,000 feet between the survey and your contract; is that not right? A. Well, there is 1,000 feet difference between this, 1,000.41 feet. This reads 39,495 square feet. After they give the frontage, they say the lot constitutes 39,495 square feet.

Q. It became apparent to you that there was a differential of some 1,000 square feet at that time? A. Yes, I think it did. My mind is not clear as to the instant that I became aware of the shortage. I became very much aware of the shortage when I received the deed.

\* \* \* \* \*

40 Q. Did you use a chart or survey to fix it? A. Right on the  
ground. Mr. Nee and myself were right on the ground, and here is  
41 where the turn-around was going in (indicating), and the person who  
bought the house to the west, Mr. Danachevsky, he was to pay half for  
the turn-around, Mr. Nee was to pay the other half, which he did.

\* \* \* \* \*

Q. Now, at the time of settlement, July 18th, did you raise any question in the presence of Mr. Nee or to the settlement clerk regarding the variation in footage? A. No.



Q. You had no conversation whatsoever on that point? A. None.

Q. General Dillon, in your direct examination you stated that your first official action was after you had received a communication  
42 from Mr. Brault, the attorney for Mr. Nee; is that correct? A. My first written action, I guess is what I said.

Q. What was the date of that? A. From Mr. Brault --

Q. That was in January or February, 1953, was it not? A. It was in -- my reply to Mr. Brault was on January 5th.

\* \* \* \* \*

43 Q. General Dillon, I show you your letter of November 12, 1952. At that time did you have any additional complaint with respect to this house? A. I was not then aware, perhaps, of any serious situation (examining exhibit).

Q. My recollection is that you first experienced difficulty in the basement, in the maid's room, and in the recreation room, shortly after you moved in; is that right? A. That is right.

Q. Is there any mention in that letter of difficulty of water seepage? A. No, there isn't. My previous letters had it.

Q. Is there any mention in that letter of variance in the footage? A. No.

Q. At this time you were, from this letter, completely satisfied, and authorized the release of \$850 in escrow? A. No, I was not completely satisfied.

Q. Let me ask you to read for the record that letter, please.

44 A. (Reading) "Responsive to your letter of November 5th, I should like to remind you that there are still a few matters left to be done prior to my authorizing the Suburban Title Company to release the amount of \$850 held in escrow.

"The pile of trash and rubbish which were left at the end of my property was promised to be cleared. This is an eyesore and by comparison to the manner in which my neighbor's property was cleared, suffers severely from a aesthetic viewpoint. Then



there is the matter of the furnace and balancing of the heat. This has been long delayed and has caused some considerable discomfort. Finally, the checking of the electric switches by Harper has not been accomplished.

"As soon as these three items have been completed, I shall be pleased to notify the Suburban Title Company to release the amount held in escrow."

\* \* \* \* \*

Q. General Dillon, calling your attention to Plaintiffs' Exhibit No. 6, which is the reference to the escrow fund held by the Suburban Title Company, were these items 1 through 6, matters that had not been completed in accordance with the terms of the contract? A. Well, yes, some of them were; and some were items which had not been  
45 completed in accordance with a workmanlike finish of the house. For instance, the surfacing of the driveway to the garage.

\* \* \* \* \*

The Court: Let me see Defendant's Exhibit 2, the second survey.

The Deputy Clerk: Yes, sir (passing same to the Court).

By Mr. Ingham:

Q. Well, is it your position that this is a new agreement?

A. This is an addendum to this. It is an addition.

Q. Was there any agreement on your part to pay an additional sum to Mr. Nee for the completion of those items? A. No.

\* \* \* \* \*

48 Q. \*\*\* Do you recall whether or not you had a discussion with Mr. Nee prior to the 18th of July, covering these items in escrow?

A. The items for which \$850 was withheld?

Q. Yes. A. Yes, we discussed this before.

Q. Do you recall when? A. No, but it was sometime before. I had seen him two or three times a week for the week or two previous, because all the job was being completed between June 5th and July 18th.



As a matter of fact, 45 days, July 20th.

Q. And you had agreed on these items in advance of settlement on July 18th? A. That he would undertake them, and then, since they were not completed at the time of the settlement, he undertook to oblige himself to do it in this contract.

49 Q. In this escrow agreement? A. Yes.

Q. In other words, the only thing that you wanted at that time to complete your contract with Mr. Nee were the items listed in your Exhibit No. 10 -- no, no, No. 6? A. That is correct, at that time.

\* \* \* \* \*

### ANTHONY MERENDINO

called as a witness by the plaintiffs, and having first been duly sworn, took the stand, and was examined and testified as follows:

### 50 DIRECT EXAMINATION

By Mr. Dillon:

\* \* \* \* \*

Q. Your occupation? A. Contractor. General contractor.

\* \* \* \* \*

Q. I ask you, Mr. Merendino, did you have occasion to examine the driveway to the garage at the residence, 8511 Beechtree Road, my residence? A. Yes.

\* \* \* \* \*

51 Q. Did you notice any ruts? A. Yes. On the right-hand side, facing the roadway, there was approximately, oh, four or five ruts in there that were causing the water to seep under the asphalt, disintegrating the asphalt.

Q. \*\*\* Let me ask you this: Did you repair that driveway?  
A. I did.

\* \* \* \* \*



52 Q. What was the cost -- not the cost, but what did you charge for doing the job? A. I charged you \$785.13, I think it was. Yep, \$785.13.

\* \* \* \* \*

A. Yes. I went in there upon your call one morning, and noticed, after a rainstorm, along the right-hand side of the den, I believe it was, there was water all the way through, coming in through the base, and then I went around, the maid brought me around into her living quarters, and there was a closet there that was approximately, oh, I think it was about a half inch of water in the closet, and then in her bedroom proper, all her clothes were damp.

Q. Did you make an examination to determine what was causing that seepage of water into the basement? A. Yes. Upon your request, we went out and we made three test holes, one at the main entrance of your building, to the left of the steps, we went down to the concrete footing, and we found no gravel and no drain tile; and we didn't find any asphalt waterproofing on it, on that side. Then we went around to the window directly facing Beechtree Drive, off the den, we done the same  
53 there; and around to the entrance on the right-hand side of the den, we dug another test hole there, and there was no evidence of any gravel or any drain tile or any asphalt on the wall.

\* \* \* \* \*

Q. Where did you determine that the water was coming into the basement from? What -- A. I believe it was seeping through the footing.

Q. What? A. Into the cove. There is supposed to be a cove at the end of the building onto your concrete footing. No cove, no concrete cove. And I believe it was coming in between the block and the footing.

\* \* \* \* \*

Q. Did you make a determination of what would be necessary to correct this condition and create a reasonably dry basement? A. In my experience, you would have to dig down to below the footing, put



in your gravel, and then first waterproof it with asphalt tar, and put in your gravel, your drain tile, and tar paper on top of that, gravel on top of that, and back-fill it. That is how we waterproof houses these days; sir.

\* \* \* \* \*

Q. Well, what do you estimate that job, that I could get a reasonably dry basement for?

\* \* \* \* \*

A. I'd say around \$1,400. Around \$1,400, because you have got to go down there approximately six foot and two foot, it would be an average around four foot digging all the way around, where a man could get in there and work reasonably.

\* \* \* \* \*

### CROSS EXAMINATION

\* \* \* \* \*

By Mr. Ingham:

Q. When did you first observe the driveway? A. When Mr. Dillon called me up to look and see how it could be repaired.

Q. Do you recall when that was? A. Yes, sometime in the -- in the spring, in April, I think it was.

Q. What year? A. This year.

Q. This year? A. Yes.

Q. 1955? A. Yes.

Q. How long, under ordinary usage, does a black-top surfaced driveway last? A. Well, there is two ways of answering that. Ordinary traffic, that is, hard traffic or light traffic?

Q. Just the usual traffic, say. A. I'd say if it's put down properly, it should last approximately five years.

Q. Approximately five years? A. Yes.

\* \* \* \* \*



Q. Could you put a truck on it within three or four hours after it is laid? A. Oh, no.

Q. What would that do? A. It would leave a slight impression.

\* \* \* \* \*

57 Q. What, in your opinion, caused those? A. The base, in my opinion, the base, if it is properly prepared, it wouldn't rut.

Q. Would it rut had it been used within a few hours after laying?  
A. If the base wasn't properly prepared.

Q. Whether it had been or not. A. No. If the base wasn't properly prepared, it would, but if it was properly prepared, it wouldn't.

Q. You probably don't follow me. After you lay the black top on a gravel base -- A. Yes, gravel base.

Q. -- how long does that have to set before you can put an automobile or truck on it? A. 24 hours.

\* \* \* \* \*

58 Q. What causes the cracking and spalling, as you described it?  
A. Improper base.

Q. Improper base? A. Improper base.

\* \* \* \* \*

Q. When was it that you made your inspection of the basement?  
A. The date?

59 Q. Yes. Approximately. A. I'd say in the month of April, I think it was.

Q. This year? A. Yes, sir. This year.

Q. You found that there was some type of parging or mortar on the outside of the walls? A. There was mortar. I can't honestly say it was waterproof cement or parged.

\* \* \* \* \*



60 Q. Now, what about speculative builders? Do they do it in all instances, put gravel and drain tile around it? A. Yes, sir. The bank --

Q. Excuse me. Go ahead. A. Your bank forces you to put drain tile around the building, in order to avoid any leakage or seepage into the basement, or having a wet basement.

\* \* \* \* \*

Q. Now, isn't it a practice nowadays to treat basements internally for dampness? A. Nowadays, yes.

Q. Isn't there some copper form of spray application that you can put on the internal part of the walls to prevent seepage? A. From the inside?

Q. Yes. A. Yes.

61 Q. What is that? A. Copper back.

Q. That is sprayed right onto it? A. Sprayed into the block, because the inside, unless it is definitely stated on your architect's specifications, if it's brick, they won't do that; but if it's block, which is porous, you have got to spray that in there.

Q. General Dillon's house is what, brick or cinder block? A. Outside, brick; inside, -- By golly, I can't answer that. It's block; the inside is block.

Q. It's porous, in other words? A. It's porous, yes.

Q. In your opinion, how much would it cost to apply this copper back? A. Never having used it, I can't say.

Q. It is reputed to be quite inexpensive, is it not? A. They say it is, yes.

Q. And it is quite effective, is it not? A. From what I read, it's quite effective; but I have never used it.

\* \* \* \* \*



62

JOHN E. FAIGLE

called as a witness for the plaintiffs, and having first been duly sworn took the stand, and was examined and testified as follows:

## DIRECT EXAMINATION

By Mr. Dillon:

\* \* \* \* \*

63

Q. Did you observe first the condition of the driveway leading

64

to the garage from the roadway? A. \* \* \* The paving of that driveway is such that if water does stand on it, it seeps into the base, and of course disintegration follows. And when I inspected the driveway, there was a raffling and exposed aggregate.

Q. Was the grade proper on that surface? A. No, it was very poorly done. I would say that the grade was put in by, possibly by people who might have been in a hurry.

Q. Now, directing your attention to the interior of the house, have you observed the recreation room and the basement generally, on several occasions? A. Yes. I have been in your home on many occasions, and there is leakage of water through your foundation walls; and of course leakage through foundation walls occurred by, in my opinion, three different reasons: One, through poorly constructed masonry; Secondly, lack of proper tile drains under the foundation walls; Third, due to hydrostatic pressure, which is a matter of the building up of water to such a height that it forces its way through walls.

Q. Did you find that that condition existed in my basement? That is, due to one or all of those conditions? A. The first two, yes, I would say so. \* \* \*

\* \* \* \* \*

68

The Witness: Although I do not practice for a monetary consideration. I would expect a driveway in a forty- to forty-five-thousand dollar home, that class, to last a minimum of ten years.

\* \* \* \* \*



68

**DERMOT A. NEE**

a defendant herein, called as a witness in his own behalf, and having been first duly sworn, took the stand, and was examined and testified as follows:

**DIRECT EXAMINATION**

By Mr. Ingham:

\* \* \* \* \*

69

Q. Mr. Nee, when did you acquire the premises known as Lot 143--296, in the plat of Burning Tree Valley; in other words, the home you sold to General Dillon. A. When did I buy it?

Q. Yes. A. I bought it at a foreclosure sale, which was auctioned off. The exact date escapes me, but it's a matter of record which you have there.

Q. Approximately how long was that before you entered into negotiations with General Dillon for the sale of the house? A. I would say that, within a matter of two weeks after my purchase of the property, a contract purchase, I had not received it as yet, because it was a matter of a trusteeship, two weeks or so thereafter I was contacted by a man I presume to be Mr. Dillon's agent, Paul Stone, and he told me that he had a sale for that house, and after some negotiation, a contract was entered into between myself and General Dillon.

70

Q. When you acquired title to the house, what was the state of completion? How far completed was the house?

\* \* \* \* \*

Q. Referring you to Plaintiffs' Exhibit No. 1, which is the contract between you and General Dillon, dated June the 5th, on the back of the contract it states that the entire house is to be finished in all detail, and in good, workmanlike manner, within 45 days from the date of this contract. Does that refer to the completion of the remaining 10 per cent of the house? A. Yes. The property was about, as I say, 90 per cent



71 completed, and before we could enter into the house to do anything with it whatsoever, to have any mechanics work in it, I had to get clearance from the Equitable Life Insurance people, who delivered the deed to me, and the reference here to the finish of the house had to do with that part of the work with which I was concerned.

Q. What was that, Mr. Nee? A. It was the remaining completion, which was the part that was not completed to the extent of \$4,500 draw money yet to come on the amount of the first mortgage; when that finish would have been completed, the builder would have been able to get his final payment of \$4,500. Now, we estimated \$6,000 worth of work yet to be done on the property, which included painting the walls inside; the walls at that time were plastered, they were not painted, we had to paint them.

The basement, speaking about the basement, the basement was completed in every regard. The paneling had been put into the rooms. The paneling -- the walls in the recreation room were concealed with this paneling, and a ceiling had been put in by the original builder. Electric lights had been installed at the time.

The bathrooms were tiled, and outlets for all the utilities, but the fixtures, the plumbing fixtures had not yet been delivered, and were part of the remaining \$4,500. The downspouts and gutters on the building were not installed. That also was part of the remaining \$4,500 worth of work. The driveway had not yet been installed, nor had the pavement. The pavement to the front door, the flagstone pavement, I believe, had been put in. The driveway had not been put in. The lawn had not been graded and had not been sodded. The lot had not been cleaned up. The flagstone terrace referred to had not yet been installed. The electrical wiring had, however, been completed. The heating of the house had been installed, and for all intents and purposes had been acceptable to all concerned. \*\*\*

\* \* \* \* \*



73 Q. Do you recall who prepared this contract between you and General Dillon? A. Yes, I do.

Q. Who was that? A. Paul T. Stone.

Q. Did you know how he obtained a figure of 39,495 square feet?

A. I don't know exactly how he got it.

Q. Did you furnish him with that? A. No, I didn't. \* \* \*

\* \* \* \* \*

Q. Prior to the settlement of July 18th, did you and General Dillon have any discussion as to the variance in square footage?

74 A. Yes, indeed.

Q. Do you recall when that took place? A. Yes, I do. The first indication of any variance, the first I had known about it was when General Dillon apprised me of such a variance at the title company, when we first were going to settle this case. He had moved in the house. He had not paid for it. I was in the position of wanting to make a settlement. He had notified me, I had been notified by the title company that the title was ready, and at the first meeting at the title company, Mr. Dillon made it known to me that there was a difference in the area involved.

I was astounded at any such difference, not knowing how it arose. The property next door to it, which I had title to only in name, because there was a mortgage on that property which could not be disturbed, and I couldn't make any changes whatsoever in the area of the adjoining property. I don't regard the property out there as valuable in the sense that it is so much a foot, or anything like that, and if I had had loose ground, I would have been very happy, just to keep peace, to go ahead and give him what he thought he was entitled to.

Q. Prior to the settlement, then, General Dillon did know that there was a discrepancy between the footage? A. \* \* \*The matter was  
75 raised at the time of the turn-around, and I was required to take that statement and sign it and give it to the title company.



Q. Are you referring to Defendants' Exhibit No. 2 for identification? A. That's right.

76 Q. Was this discussion on July 18, 1952, at the title company?

A. We met more than one time at the title company.

Q. I show you on this exhibit -- is that your handwriting?

A. Yes, it is.

Q. And who made that drawing on the survey plat? A. I presume I did. I wrote this -- right. I was required by General Dillon to put this on this matter before he would complete his settlement with me at the title company.

\* \* \* \* \*

Mr. Dillon: I object, on the ground that that plat has no relevance whatever to this. The issue in this case is the asserted variance between the acreage --

The Court: The contract and the deed.

77 Mr. Dillon: The contract of sale and the deed. And in this there is no reference to this in either the contract of sale or the deed. And I assert that this has no relevance, and the fact that he wrote something on this at the day of closing, July 18th, has nothing whatever to do with the issue of variance.

\* \* \* \* \*

The Court: The issue is, if I understand it, and if I don't understand it, correct me -- they claim that you finally, because of other conditions made or concessions granted, accepted the acreage, and this is offered at least to show that the discrepancy was in the mind of both parties at the time you conferred at that time.

Mr. Dillon: Then, your Honor, I object to it on the ground that there has been no showing that I ever saw this.

The Court: No, there has not been.

\* \* \* \* \*



Mr. Dillon: In addition, your Honor, I object to it on the ground of its irrelevancy. I object also on the ground that this is dated, certified June 27th. The contract of sale was on June 5th, 22 days before  
 78 this was certified. So that this is dragged in without relevance, for the purpose of showing that I had knowledge. This is not the variance that I am asserting. The variance between the contract of sale and this is 1,000.41 feet. That is not the variance that is in issue. The variance in issue is 1,528 feet, which is the variance between that which is asserted to be delivered to me in the contract of sale and what was actually delivered to me in the deed.

So I say that if I saw this, it made no impression on me. But the deed, what I actually got, because this had no reference whatever to what I was going to get --

The Court: I understand.

Mr. Dillon: And for that reason, I object to it, as being entirely irrelevant, and merely introduced to cloud the issue.

\* \* \* \* \*

Mr. Ingham: This is the only survey we have before us, the only thing that we can determine whether or not there was a footage shorage.  
 79 The plaintiff offered no survey. We are tendering a survey to show exactly what that property consisted of. The deed merely makes reference to another survey. That survey is not here. We don't know what that survey was, and this is the primary evidence of the total footage.

The Court: Let's get the evidence in and then I'll hear your argument on both sides.

Mr. Dillon: What was actually asserted in the deed as delivered, I have accepted as being delivered, and I can't claim any property on some survey that is not either in the contract of sale, or in the deed, so I have no -- I again assert that it has no relevancy.

The Court: I understand your contention. Let me raise a point; I am always trying to clear the issue and simplify it, if possible. A statement was made by the plaintiff when he was testifying, that at the



time, at one time the defendant owned property, adjoining property, from which any deficiency, if there was any deficiency, could have been supplied. The defendant has just testified that that was impossible. And is it still impossible; is that your contention? You do not own any adjoining property?

The Witness: I did not at the time, your Honor.

The Court: And the granting of additional land is out?

The Witness: Was at that time, and has been ever since.

The Court: Then, in that view of the case, if that is sustained,  
80 and you do not show that it is possible to supply additional land, what would be your attitude? You want damages, or do you want to cancel the sale and be relieved of your obligation?

Mr. Dillon: I would first ask for a judgment of specific performance, in which he would be required --

The Court: If that is impossible.

Mr. Dillon: If it is not impossible, this adjoining owner, from whom the amount could be purchased, and at the time, your Honor, at the time he owned the property. The fact that it was mortgaged has nothing to do with it. Title, he says, is only in his name. He had title to that property, and conveyed it with knowledge that I was claiming 1,528 feet, conveyed it later in December with the knowledge --

\* \* \* \* \*

The Court: I want to clear up the issue, and if it is impossible to have specific performance, then I want to know what, if on a full hearing of the case and consideration of the exhibits, it is found that your claim is justified, what would be the alternative. There is no evidence as to what land there is worth on a square-foot basis.

81 Mr. Dillon: No, sir, your Honor, there has been no evidence because we primarily asked for specific performance or rescission. We didn't feel that on those issues there was any valuation admissible at this point.

The Court: I would think that evidence would be admissible as to



what the property would be worth, if the acreage was in accordance with the deed, and what it would be worth if the acreage is only fifteen hundred--

Mr. Dillon: 1,528 foot short.

The Court: -- less.

\* \* \* \* \*

The Court: I don't attach as much importance to that issue, as a legal technical issue -- it is important, I see that, but in value, I don't know, there has been no expression -- I say, I feel that these parties might have settled this, if that is all there was in the case. If I am wrong, I would like to be enlightened. If there is a great difference in the value of that property, determined by a variance of fifteen hundred square feet or a thousand square feet --

82 Mr. Ingham: I have an expert that I intend to put on to show that.

The Court: Very well. You may proceed, then.

By Mr. Ingham:

Q. Mr. Nee, did you or your contractors have anything to do whatsoever with the basement walls in this house? A. After the contract with General Dillon, at the time we accepted the property from the trustees of the foreclosure, we noticed that the windows in the basement, there were iron frame windows, regular --

Q. My question was: Did you have anything to do with the construction of the walls? A. Not with the masonry at all. We didn't touch that. We actually did just what the contract called for. In other words, to put Celotex in the maid's room, put a ceiling in the maid's room, at the place where General Dillon pointed out to us exactly where he wanted it, and we did exactly as he asked us to do.

Q. Did you or your contractor have anything to do with the roof of this house? Did you install the roof? A. No. We did install a downspout and gutters on the house.

83 Q. I show you Plaintiffs' Exhibit No. 6, which is an escrow agreement for money held at the title company. Could you tell the Court whether or not items 1 through 6 have been performed in accordance with



that agreement? A. Yes, sir. They have all been performed, and as we have been told, satisfactorily to the plaintiff here.

Q. Did you make demand upon the title company to release the escrow funds? A. Yes, we did, and they were unwilling to do so without a release from General Dillon.

\* \* \* \* \*

The Court: And which items, now; refer to them by number, please, if you will.

The Witness: I will read them for you.

The Court: Very well.

The Witness: The first thing we were to do was to surface the driveway to the garage. At the time General Dillon moved into the property and they made settlement with us on the house, the driveway was at that time being graded and prepared for the topping. That is why this is included in here. It had not been completed. Possibly by the time he got home from the title company, that work had been completed. He was unsatisfied with it. He let us know promptly that he was not satisfied with the width of this, and also the fact that it was soft. The fact that it was soft was because it is not the type that sets in 24 hours, it is much slower in the setting period than that, and the contractor is just as reputable in his line as anyone is, so he came back at my request and at General Dillon's request, and we widened the driveway to what we thought was, and we had been given to understand was General Dillon's requirement. We widened it and resurfaced it. That was number 1.

The rolling of the lawn: At the time when the lawn was being prepared, General Dillon was at that time living in the house. There was naturally lumps and hollows in the lawn. It is a freshly laid sod lawn. At this time, too, there was a lack of water, there was a lack of rain, and we had some hoses strung all over his front lawn and rear lawn as well, and the contractors on this work worked like beavers, and they got the job more or less finished about the time he was ready to move in, but there were some parts of it that were not finished in the



front; and again, possibly by the time he got home from the title company, that work had been completed; but at the time that this was made out, the remainder -- it remained to be done; so it said, rolling and sodding the lawn. That work was completed. The change in laying the patio terrace, that is number 4, and we had quite a debate about that.

Q. Excuse me. Item 3 -- A. Sodding the remainder of the lawn.

85 Q. Does that refer to the back, as testified to by General Dillon?

A. In our contract with General Dillon, and it was quite well spelled out, that part, it was Paul Stone's idea to make it 10 feet around the house, and all of the front lawn. It's quite an extensive front lawn, and we thought it was beautiful when it was completed. However, there was a part in the rear that goes back down to the woods, and as the General has pointed out, it is a matter of approximately 30 feet by 100 feet, where our contract did not call for sodding. I didn't ask General Dillon if I could seed it, I knew I could seed it, so I proceeded to seed it with grass seed, and a man was employed to do that work. That is number 3.

Sodding remainder of the lawn, referred to in here, and nothing to do with anything except that part which was in the contract, which had not yet been completed, and was, eventually, within a matter of hours, completed.

Number 4, changing and laying patio terrace: We laid what we thought was an adequate terrace in the spot where the General wanted that terrace laid. The contractor did that. The general contractor supervised it, supervised the sub-contractor on the stone work. All these people are qualified people. They laid it in sod, they didn't lay it  
86 in concrete, because there was no call for laying it in concrete. They laid it in the sod, which most people think preferable. The General looked at it and said, "I think I would like it up on the other side, like it up here on the back."

Well, but he also wanted to have some kind of a pavilion built from his house out, and my contractor was very anxious to complete this job and not get involved in any further dealings along these lines,



so he gave the General some kind of a vague answer to what the cost or approximate cost would be to build a further addition on this.

The General said, "All right, go ahead."

\* \* \* \* \*

89

By Mr. Ingham:

Q. You stated that these were completed to the satisfaction of the General? A. As far as we knew, and we had been given to understand that.

The Court: Then your testimony is, if I understand it, all six, --

The Witness: Everything has been completed.

The Court: -- you say were performed to his satisfaction?

The Witness: We had been given to understand that by General Dillon, your Honor.

The Court: Very well.

By Mr. Ingham:

Q. I refer you to Defendants' Exhibit No. 4, the letter dated November 12. A. Yes, sir.

Q. Do you recall the receipt of that letter? A. I do.

90 Q. And the only conditions asked for by the General in order to release the escrow fund; isn't that correct? A. That is correct. And just one remark: None of these conditions of release of the escrow fund had anything to do with the escrow fund at all.

Q. In other words, everything had been completed to his satisfaction previously, and he raised some new points? A. We knew it, and every time there was new points -- excuse me.

\* \* \* \* \*

91 Q. Was a leak in the roof called to your attention? A. Yes.

Q. What caused that leak, sir? A. I don't know what caused it. The man who went out to repair it is a man who put the slate roof on it originally, Mr. Ingham, another reputable contractor, and he charged me \$40 for making the repairs of the roof, which I paid.



92

By Mr. Ingham:

Q. Was the roof leaking at the time you delivered possession to the General? A. (The witness shook his head in the negative.)

Q. Did you warrant in any way, in any instrument not here, that the roof would not leak? A. No.

Q. Did you execute any contract or agreement whereby you warranted that the basement would be waterproof or leakproof? A. No, sir.

\* \* \* \* \*

95

### CROSS EXAMINATION

By Mr. Dillon:

Q. Mr. Nee, you made some reference to your understanding that Paul Stone was my agent; is that correct? A. I thought so, yes, sir.

\* \* \* \* \*

100

Q. As to the addendum, or subsequent agreement, as it has been called, you say all six items were completed to my satisfaction, did you not? Was that your testimony? A. I said this, General: We completed, I completed all six of those items to what I understood to be your satisfaction.

Q. What caused you to believe it was to my satisfaction?

A. Because you stopped harping on them after we had finished them.

Q. I see. Then, I ask you this: Did I bring you to the driveway and point out, show you the marks actually in the driveway, some two weeks after you had purported to resurface? A. You sure did.

101

Q. Then how do you assume that I was satisfied? A. Well, now, those were your own shoe marks, General. You had stood in that when that stuff was hot. When I put that driveway down for him, he moved his trucks right in, whether there was a hot driveway or not. You moved in while the drive was hot and put your own ruts in there in your own driveway.

\* \* \* \* \*



Q. I want to clear up the question of regrading. You also stated that this man you employed was just as competent as the people that I have had testify as to what was wrong with it; is that correct? A. I think I said, in my opinion they are, yes.

Q. Who? A. Mr. Shuff.

Q. Is he a barber by profession, in Bethesda? A. I don't know.

\* \* \* \* \*

103

By Mr. Dillon:

Q. As to sodding the remainder of the lawn, as enumerated here: You say I was in the house. Was there any sodding done after I was in the house? A. I believe it was done while you were in the process of getting in the house.

Q. No. I was in the house at the time of closing. A. Yes, you were.

Q. Now, you said, it was your testimony on direct testimony that while I was at the closing, they did some -- A. That's right.

Q. -- sodding. A. Yes, I did say that.

Q. You just stated there was some sodding done after I went in the house. A. I didn't say that, General. I didn't say there was no sodding done after you moved in.

Q. Didn't you? A. You said it. I didn't.

Q. In response to my question, you said there was none after I moved in. A. If I said it, I didn't realize I said it. The fact of the matter is, as you were moving into the house, and it takes days to get in, the sodding went forward and was completed. The contract was paid by us to the subcontractor, and we were not going to pay a contractor for work he hasn't completed. He did the job on a contract basis, and we were perfectly happy and satisfied with it, and we paid him, and then, whether you were moved in completely or whether you weren't, I wouldn't know.

\* \* \* \* \*



110 The Witness: I will listen to your question, and when I see it's all right, I get led on --

111 Mr. Dillon: I have no intention of getting anything out but the truth out of you, Mr. Nee.

\* \* \* \* \*

By Mr. Dillon:

Q. Well, then, if at that time you did, then your assertion that on November 12 you had completed everything in a workmanlike manner  
112 is not correct. A. Now, you say -- I didn't make any assertion that I had completed everything in a workmanlike manner. He is referring to these items of escrow which I say I completed in full. \* \* \*

\* \* \* \* \*

The Court: I take it from the witness' answer that he did assume to do something about the heating, and had the heating people go there and make alterations, so evidently he did acknowledge either a liability to do it or a willingness to do it, regardless of the contract, in order to bring about a peaceful settlement.

113 Mr. Ingham: That is the position of the defendant. Anything he did was without consideration. All were attempts to settle the case and get the thing disposed of, but he had no legal obligation to do that.

\* \* \* \* \*

By Mr. Dillon:

Q. Mr. Nee, as to the leak in the roof, did you feel obliged to have that leak repaired when you were notified? A. Whether I felt obliged to do it or not, I did it, and I paid for it. You were not there, General, but Mrs. Dillon called me and said you had gone away, and asked me to please see if something could be done about that leak up there. Well, in your absence, I didn't have -- there was no one for me to argue with, and I simply felt, if I were not disposed to do it, what then? \* \* \*



Q. Did you feel obliged to repair the damage done by the leak?

A. No, sir.

\* \* \* \* \*

114

WAYNE C. GREATHOUSE

called as a witness by counsel for defendants, and having first been duly sworn, took the stand, and was examined and testified as follows:

115

DIRECT EXAMINATION

By Mr. Ingham:

Q. State your full name, please. A. Wayne C. Greathouse

Q. Your occupation?

\* \* \* \* \*

A. Land surveyor.

Q. Who are you associated with? A. I am associated with Thomas G. Oyster and Associates.

\* \* \* \* \*

Q. I show you two surveys which have been marked Defendants' Exhibit No. 1 and Defendants' Exhibit No. 2, and ask whether or not you are familiar with that survey. A. Yes, I am.

Q. Other than the matter that is written in ink on Exhibit No. 2, and also the red outline, are those two surveys the same, and figures the same? A. Yes, they are reproductions of a tracing. There seems to be no alteration.

116

Q. Will you state from the survey the total number of square feet in that Lot 4 and part of 5? A. Our survey shows total area to be 38,495.41 square feet.

Q. How were those figures arrived at? A. Those figures were arrived at by certain mathematical calculations. I don't know how to describe it.

Q. They were -- A. These precise computations.

Q. These are precise computations? A. Yes.



Q. I also show you a deed, which is marked Plaintiffs' Exhibit No. 2, which refers to the same two lots in this survey (indicating on exhibit) with a total square footage of 37,967 square feet. Are the metes and bounds of the area the same in this description as in the survey?

A. The metes and bounds are the same, but the area is not.

Q. In other words, the total square footage is less in the deed than it is in the survey? A. That is correct.

Q. However, the description is the same in the survey as in the deed; is that right? A. That is correct.

117 Q. Can you account for the difference in the square footage?

A. Yes. Our check shows that whoever made the original computation failed to take into consideration this difference between this straight line between those two points, what we call a segment of a curve. They did not add that area.

Q. If that area were added to this figure in the deed, it would come out to the figure in your survey? A. It would agree with our figure, within a foot and a half.

Q. So, from the deed, the present owner of the property actually, instead of having received only 37,967 square feet, received and is actually occupying 38,495 square feet; is that correct? A. That is correct.

Mr. Ingham: You may ask.

Mr. Dillon: Since I have objected to this plat as being completely irrelevant, regardless of what it shows, I have no questions.

\* \* \* \* \*

118 The Court: They will be received and considered by the Court, but they have no effect here unless the testimony convinces the Court that it was accepted. The testimony is now that that was present at some of their discussions, that survey. The plaintiff himself acknowledged that he had seen that survey.

\* \* \* \* \*



The Court: This testimony is pertinent and this survey will be received to interpret his testimony, but the pertinent part is that he shows that the deed is giving -- the plat is giving a larger acreage than the deed itself recites.

\* \* \* \* \*

128

# EDMUND DUVALL HARLLEE

called as a witness by counsel for defendants, and having first been duly sworn, took the stand, and was examined and testified as follows:

## DIRECT EXAMINATION

By Mr. Ingham:

Q. State your full name. A. Edmund Duvall Harllee.

Q. Where are you employed, Mr. Harllee? A. Suburban Title Investment Corporation.

Q. In what capacity? A. Settlement clerk.

Q. Do you recall having an occasion to settle a contract of sale between Dermot Nee and Major General Dillon? A. I do.

Q. In 1952? A. I do.

Q. Were you the settlement clerk at that time? A. I was.

129

Q. I show you a deed, Mr. Harllee, marked Plaintiffs' Exhibit No. 2, and ask whether or not that deed was prepared in your office and under your supervision? A. It was.

Q. Was that executed in your presence? A. Yes, I was the notary public.

Q. You witnessed the signatures? A. I witnessed.

Q. The 18th of July? A. 1952.

\* \* \* \* \*

Q. In this case, Mr. Harllee, did you issue a certificate of insured title? A. I issued a policy, mortgagee title insurance policy, to the Lincoln National Bank of Washington, and an owner's title insurance policy, to Joseph V. Dillon and Lois B. Dillon.

\* \* \* \* \*



130 Q. Will you advise the Court whether or not the policy makes any exception to a differential of or variance in the footage? A. Under Conditions and stipulations of this policy, under Item 11, it reads:

"Deficiencies in quantity of ground, conflicting lines, or variances between lines of record title and lines of ground as used and occupied, are matters not ordinarily disclosed by the records, and can be definitely ascertained only by survey, and the companies therefore are not responsible for such deficiencies, conflicts, or variances. The insured must rely for protection in this respect upon the surveyor who, in all cases, is agent and employee of the insured, and not of the companies."

Q. At the time of settlement, were you aware that there was a variance in the footage between 1 and 2 surveys? A. The survey plat that was in our file, made by Thomas G. Oyster, was the same metes and bounds description as contained in the deed to General Dillon. The  
131 only variances that we could find out, which we didn't insure against, was the fact of the quantity of the ground.

Q. How would that be determined, by a new survey? A. That would have to be determined primarily by a surveyor, not our employee.

Q. So, in view of that variance, you made the usual exception in your title insurance? A. Yes, because the metes and bounds of the deed description are the same as the metes and bounds of the other description.

\* \* \* \* \*

Q. Mr. Harllee, I show you a letter, actually a copy of a letter, marked Plaintiffs' Exhibit No. 6, and ask you whether or not you have the original. A. I do, sir.

132 Mr. Ingham: I don't think there is any dispute but that we might continue to use the copy in evidence.

Mr. Dillon: That is agreeable.



By Mr. Ingham:

Q. Do you still hold those funds in escrow? A. We still hold \$850.

Q. Has demand been made upon your company for release of that escrow fund? A. On December 22, 1952, Mr. Dermot Nee wrote us concerning a settlement of Lot 4, Block A, Burning Tree Valley, 8511 Beechtree Road, in the name of Major General Dillon, with particular reference to the agreement drawn to cover certain items for which \$850 was placed in escrow -- you are advised that all items set forth in this agreement have been discharged in the following order: \*\*\*

\* \* \* \* \*

133

### CROSS EXAMINATION

By Mr. Dillon:

Q. Mr. Harllee, I call your attention to item 11, with respect to deficiency in ground, and your provision. Is that an ordinary provision? A. That is standard.

Q. That is printed? A. That is right.

134

Q. It was not inserted because of any known variance in this particular case? A. No, sir.

Q. It is a standard provision that you always put into your contract, and it is printed, rather than typewritten in; is that right? A. That is correct.

Q. Was there any discussion in your presence about any variance? A. Not to my recollection, General.

Q. Were you present through the entire proceedings at the closing? Were you not? A. Yes, sir.

Q. When was the deed prepared? A. You mean what date, sir?

Q. The time -- A. Prior to the date of settlement; yes, sir.

Q. And sent for recording on -- A. At a later date.

Q. It was recorded, if I can refresh your memory, on July 30th, and then sent to me. A. Right, sir.



Q. There was no discussion about metes and bounds or anything else at the closing? A. To the best of my knowledge, I don't recall it.

135 Mr. Dillon: No further questions

### REDIRECT EXAMINATION

By Mr. Ingham:

Q. One further question. You knew there was a variance at the time? A. Actually, the only variance I knew at the time was because the survey in my file was different from the description we had issued.

Q. Now, at the time of settlement, was the deed exhibited to General Dillon? It was executed right there at that time; was it not?

A. I don't --

Q. The deed shows execution and witness by you on July the 18th. There is the notary -- A. I attested the signature of Mr. and Mrs. Nee. This notary is not in our office, so it was not executed in our office.

\* \* \* \* \*

Q. Then, the deed was there at the time of settlement, was it not, sir? A. I don't recall, sir.

Q. Customarily it would be? A. Ordinarily, yes, sir.

136 Q. If the husband and wife were in there to execute a contract of sale and execute the deed, the deed would have to be there? A. That is right.

Q. Ordinarily, the purchaser is sitting right there at the settlement desk? A. Ordinarily, yes.

Q. Ordinarily, he is exhibited this deed; is that not so, customarily? A. Customarily, yes.

\* \* \* \* \*

Mr. Dillon: One question. Was that displayed to me?

The Witness: I do not recall, General.

Mr. Dillon: No further questions.

The Court: That's all, Mr. Harllee.

Mr. Ingham: May this witness be excused?

The Court: Yes.



**C. ARTHUR SLATER, JR.**

called as a witness by counsel for defendants, and having first been duly sworn, took the stand, was examined and testified as follows:

**DIRECT EXAMINATION**

By Mr. Ingham:

137 Q. State your full name, please. A. C. Arthur Slater, Jr.

Q. Your occupation, Mr. Slater? A. Real estate broker and developer.

Q. Where? In the District? A. Maryland and the District.

Q. How long have you been so engaged, Mr. Slater? A. Since 1937.

Q. Are you familiar with the property values in Montgomery County? A. Yes.

Q. Are you familiar with the area around Beechtree Road?  
A. Yes.

Q. Specifically, are you familiar with Lot 4, and part of 5, in Block A, Beechtree Road? A. Yes, sir.

Q. In your opinion, that survey -- and I show you Defendants' Exhibit No. 1 -- shows a total area of 38,495.41 square feet, and I will ask you if that and the house outlined there had been sold for a total sales price in July 1952, of \$42,750, whether subsequent to the execution of the contract it developed that there was some variance or deficiency in ground, might be 750 and might be as high as 1,500 feet; would that, in your opinion, reduce the total value of that house and property?

138 A. If I understand you correctly, if the ground is merely back ground, it would not affect the value of it; no.

Q. In your experience, you say you are a developer, do you make any differentiation between houses in the same area, one might have 900 square feet less than another, in the same general class or price of houses; would a difference in ground in that area make any difference?

A. Not in our opinion. We treat each lot as a unit, and the house is



priced at X dollars per unit, but as long as they are approximately the same size, there might be a variance of two thousand or twenty-five hundred feet, as was the case in one development we have at the present time in Montgomery County, a comparable home, thirty- to forty-thousand dollar home.

Q. Then, in your opinion, in 1952, a variance of possibly 1,400 feet would not affect materially or in any way the market value of that home and lot? A. I would say it would not have any effect on it. The house should be priced on it, and a small variance in the amount of land would not have any effect on the total price.

Mr. Ingham: You may ask.

#### CROSS EXAMINATION

By Mr. Dillon:

Q. Mr. Slater, at what point would a deficiency have an effect  
139 upon the property as a whole? In other words, you stated that 1,400 or 1,500 feet would have no effect. Would 2,000 feet have any effect?

A. In my opinion, as a unit it would only be of value when it would be usable for an additional unit. It would have to be in such an area or arranged in such a fashion that you could build two houses instead of one.

Q. That is looking at it from a developer's viewpoint as to selling. Now, I'd like to project you onto the other side. Where would a line start at which a deficiency would have a material difference in the value, cause a material difference in value? Is it 2,000 or 3,000 or 10,000 square feet? You said 1,500 has no effect. Now, would 2,000 have some effect? A. I think that the best gauge would be as to where it was and what the land was. If it was a beautiful lot, it might be worth more, but on the other hand, if it was back land, lying behind, and unusable for a lawn, and such, it still might not have an effect.

Q. Of course, when there is a deficiency, you don't know where the deficiency is, whether it is on the front lawn, rear lawn, but there is a deficiency. I am trying to get your view as to where a deficiency in quantity would have some effect on value, and what effect it would have.



140 A. In my opinion, it would have to be a substantial differentiation, and there again I would have to say it would have to be usable land for some purpose. It would have to be at least 10,000 feet additional, or so located that on either or all of it, you might be able to build or have another dwelling site.

\* \* \* \* \*

146

# REDIRECT EXAMINATION

By Mr. Ingham:

\* \* \* \* \*

Q. If there were a ground shortage in this particular case, it would necessarily have to be toward the back of the lot; is that not so?

A. If the contract calls for 145-foot frontage and there is a discrepancy  
147 in the total area, it would have to be in the back of the lot, couldn't be in front.

Q. Isn't there a difference in value of ground between the front and the back? A. Yes. The county recognizes that, and all agencies recognize that. It is a well-founded theory of value that a lot which has, say, a normal depth, and the county figures the normal depth to be 150 feet, over 150 feet they use a sliding scale. In other words, they don't tax the back ground at the same rate they do the front ground. They have a sliding scale of valuation.

Q. In this particular case, knowing the shortage, if any, is in the back ground, and, for example, say there is a 1,400 foot shortage, would that, in your opinion, as of July 1952, materially affect or affect at all the value of this contract of \$42,750? A. Not in my opinion.

\* \* \* \* \*



150

## ROGER ALLEN MUSE

called as a witness by counsel for defendants, and having first been duly sworn, took the stand, and was examined and testified as follows:

## DIRECT EXAMINATION

By Mr. Ingham:

Q. Will you state your full name, please? A. Roger Allen Muse.

Q. What is your occupation, Mr. Muse? A. I am a real estate broker and builder.

\* \* \* \* \*

Q. In 1952, were you a builder? A. Not in '52, but I was in '51.

Q. May I ask you whether or not you built the home known as 8511 Beechtree Road? A. I did.

151 Q. What happened to that home? Did you sell it, or --  
A. No, sir. I built that house, started it in 1950, had it about 90 per cent completed, and in January 1951 I was taken very ill and I went to the hospital; and I lost five or six houses out there, on foreclosure.

Q. You say that house was 90 per cent completed. What remained to be done at the time you lost the house? A. The driveway to the garage, the garage doors, screening of the breeze way porch, grading of the lot, and painting of the interior of the house, was the only things left.

Q. All exterior work had been completed, the roof was on, and everything? A. Oh, yes.

Q. During the period of 1950, when you started construction of the house, until 1951, what part of 1951 was it that you last were on the job? A. The 8th of January 1951.

Q. During that period, did you have occasion to be around the job frequently? A. I was on it all the time.



Q. All the time? A. Yes, sir.

152 Q. During that period, was there any, or did you observe any moisture or any leakage in the basement? A. None whatsoever, excepting we had, in the fall of 1950 we had a storm and a little water washed over one of the window wells.

Q. Was there any seepage through the wall or under the footings of the house? A. None whatsoever.

Q. During that same period, was there any leakage from the roof; from the time you had the roof on it, was there any leakage? A. I am not sure. I had one house out there that Mr. Ames, when he put the roof on, he cut his valley a little short, and I had a leakage, and it was discovered before I flashed it, and he came back and took off enough slate to widen his valley so that you could never get any more leakage.

Q. In any event, that would have been before you plastered; is that correct? A. Absolutely.

\* \* \* \* \*

156 Q. During the period, the entire period that you were on the job, the only time you had water inside the house was as a result of one of those windows having been left open? A. The one on the back side, and we had not graded, and the raw dirt was piled up back, so that the water accumulated there and ran over that window well and into the basement.

\* \* \* \* \*

# 157 CROSS EXAMINATION

By Mr. Dillon:

\* \* \* \* \*

158 Q. Mr. Muse, you also stated that in your waterproofing process, that you not only parged but you put an asphalt facing on the parging.  
A. Right.

\* \* \* \* \*



159 Q. Now, then, we have testimony before the Court to the effect that it would be necessary, at the footing, to lay a bed of sand and tile a way -- that is a requirement of F.H.A. in building, and that it is a sound requirement -- that's the testimony. Will you explain why, with your waterproofing system, water has, on every rainstorm occasion, seeped under or between the footing and the building, so that there is in the recreation room, in four different ingresses, pools of water invariably, and in the laundry room -- do you recall that is where the laundry room is (indicating)?

\* \* \* \* \*

170 A. Well, Mr. Dillon, I'll say this: Now you are asking me to sit here and tell you why certain things are happening. I can't do it, sitting here, but I can come out there and show you why your house is leaking, and I will  
171 guarantee that it is because the drainage away from that house on the surface of the ground is not correct.

\* \* \* \* \*

183 HENRY F. KIMBALL

called as a witness by counsel for defendants, and having first been duly sworn, took the stand, and was examined and testified as follows:

#### DIRECT EXAMINATION

By Mr. Ingham:

Q. Will you state your full name, please? A. Henry F. Kimball, Jr.

Q. And your address, Mr. Kimball? A. 5910 Namokagen Road, Glenmore Park, Maryland.

Q. What is your occupation? A. Builder.

Q. Self-employed? A. Yes.

\* \* \* \* \*

184 Q. In 1952, did you have occasion to act as contractor for Mr. Dermot Nee at 8511 Beechwood Road? A. Beechtree Road.

Q. And do you recall when you started your work in that property?



A. Yes, sir. Approximately around the 1st of July, and I finished my work approximately the 17th of July.

Q. When you started, under your contract, what was the state of construction? How far had the house been completed? A. The house had been trimmed, and of course the finish floors had been laid, but not finished. Some of the trim had been primed. The outside was pretty much to grade. The well had been filled, but had not been brought in, and well pit had not been built. The driveway was not in. In other words, we had to paint the house, finish the floors, put in the driveway, the well pit, and sod the lawn, and plant the shrubs around the house.

Q. Under your contract with Mr. Nee, you had nothing to do with the roof or the footings or basement walls, did you? A. No, I did not.

185 Q. During the period that you were there, do you recall any rain spells or rainy periods? A. Yes. It rained quite frequently.

Q. Did you have occasion to be in the basement at any time during those spells? A. Yes, sir.

Q. Did you observe any leakage through the footings or through the walls? A. None whatsoever.

Q. During the time you were there, during those rainy spells, did you observe any leakage from the roof? A. No, I did not. Just one thing; in one rain, water did come under the weather stripping of, you might say, the door to the rear yard, which is, or was corrected by putting gutters on the house. I also had to do that. And in the further rains, no water did come underneath the sill again.

Q. During the period that you were on the job, did you have occasion to substitute refrigerators and ranges? A. Yes, I did.

Mr. Ingham: I understood there is no dispute as to that amount.

Mr. Dillon: There is no dispute. That is stipulated.

\* \* \* \* \*

By Mr. Ingham:

Q. Did you subcontract the surfacing of the driveway? A. Yes, I did.



Q. Who did you use as a contractor? A. A man by the name of Charles Shuff.

Q. Was he engaged in the business of road surfaces? A. Yes.

Q. A contractor? A. Yes.

\* \* \* \* \*

187 Q. Were you present or did you observe the manner in which he surfaced or resurfaced that driveway? A. Yes, I did.

Q. Will you describe to the Court what method he followed?

A. All right. Mr. Shuff owned a great big old-fashioned roller, and he rolled the sub-grade with the roller, put in four inches of bluestone crushed, and rolled it some more, and called me and said, "I'm spraying asphalt on this"; and then added a cold-mix asphalt surface, and rolled it after each operation.

Q. In your construction work, you have occasion to have a lot of roads and driveways -- A. Not a lot, but I do understand that is the proper way to install a residential driveway.

Q. In your opinion, that was the approved method? A. Yes.

Q. In that manner of using the cold pack, does it require any time to set up, or take up? A. It does require maybe 24 or 48 hours, and then as the driveway is used and does set up, it becomes better. In other words, the driveway improves with age.

188 Q. But it should not be used for a period of 24 to 48 hours; is that correct? A. That is correct. And also discretion should be used as to the weight of vehicles put on it. I mean, insofar as heavy trucks, and things is concerned.

Q. What would be the effect of a heavy truck being placed on it, say, within 48 hours? A. Well, the heavy truck would sink down.

Q. Break it up, and cause ruts in the surface? A. Cause ruts in the surface.

Mr. Ingham: You may examine.



## CROSS EXAMINATION

By Mr. Dillon:

\* \* \* \* \*

Q. Did you, yourself, examine the grade of the driveway? A. Yes, sir.

Q. What did you find? A. You mean in respect to water run-off?

Q. The grade between the garage and the end of the runway, where it meets the road. A. Let's see if my memory serves me correctly: I believe the driveway runs slightly uphill to the street.

Q. Uphill to the street? A. Yes, sir. But all water -- water never did lay in the driveway after it rained. I mean all the water ran off, and did not go into your garage. Have I explained myself?

Q. When was that observation made by you? A. Oh, after you had moved in. It must have been, because the driveway was completed just before you did move in.

Q. Completed just before I moved in? A. Yes, sir.

Q. So your testimony is that water did not accumulate? A. Yes, sir.

\* \* \* \* \*

Q. I will call your attention to a particular item, sodding and landscaping, July 13th. A. Yes. I have no idea in the world whether it was the 13th or the 14th.

Q. Yes? A. But it must have been pretty close, because we did finish the house on the 17th for you to move into.

Q. So on the 17th it was done, the sodding was completed before I moved in; is that correct? A. Yes, sir.

Q. Your testimony is, then, that the sodding was completed sometime prior to July 17th? A. Yes, sir.

Q. Possibly in accord with that schedule? A. Possibly.

Q. Did you ever do any sodding after I moved in? A. I don't believe I did.

\* \* \* \* \*



196

**JOHN B. R. WEBSTER**

called as a witness by counsel for defendants, and having first been duly sworn, took the stand, and was examined and testified as follows:

**DIRECT EXAMINATION**

By Mr. Ingham:

197

Q. Will you state your full name? A. John B. R. Webster.

Q. Your address? A. 422 Washington Building.

Q. What is your occupation, Mr. Webster? A. Real estate broker.

Q. During the period, say, 1950, 1951, what was your occupation?

A. I was a real estate broker during that period.

Q. Did you have any connection with Mr. Muse, the builder?

A. Yes, sir.

Q. Are you familiar with a home that he was building at 8511 Beechtree Road? A. Yes.

Q. Do you recall approximately when that house was started?

A. I think, sir, it was in 1951.

\* \* \* \* \*

198

Q. Were you there when the footings were poured and the concrete, in the walls of the basement? A. Yes, sir.

Q. You observed the manner in which the footings were poured?

A. Yes, sir.

Q. Were you there frequently during the time, or during the course of construction, until the roof was applied? A. Yes, sir.

Q. During that period, how long a period would that accomplish, would you say? A. I would say, sir, around thirty to forty-five days, footings to roof.

Q. Were you also present at the house when Mr. Nee had some interest or connection with it? A. Yes, sir.

Q. During all of that period, did you ever have occasion to observe whether or not the basement leaked through the footings or through the wall?

A. Yes, sir. I was in the house several times a week when it was under



construction.

Q. During rainy spells? A. Yes.

199 Q. Did you ever have occasion to observe a leakage under the building or up through the footings? A. No, sir.

Q. During that entire period did you ever notice a leakage from the roof? A. No, sir.

Q. Are you familiar with land values in Montgomery County?  
A. Yes, I am.

Q. This property has a -- you know the house has a fairly large lot, and the contract price was \$42,750. In your opinion, if there were a variance, say, of anywhere from 700 to 1,500 square feet in that ground, but having in mind that the full frontage on Beechtree Road was accounted for, would that affect the market value of the house in 1951? A. No, sir.

\* \* \* \* \*

### CROSS EXAMINATION

By Mr. Dillon:

\* \* \* \* \*

201 Q. What is the amount that would make a difference, in your opinion? A. Well, sir, I think when people are buying lots, three miles out from Bethesda, that doesn't make much difference -- the difference between 22,000 feet or 32,000 feet.

Q. So 10,000 feet wouldn't make any -- A. In most instances.

Q. It would be immaterial? A. Yes.

Q. And you think beyond 10,000, is that your testimony, beyond 10,000 it might make a difference? A. Yes, I should think it would.

Q. But 10,000 or less, it would make no difference? A. No, sir. We consider a half-acre lot, if you have sewer available, as an ample lot in the suburbs.

Q. That is, from a developer's or builder's viewpoint, or salesman's. I am trying to get your view as to values of property, and then reduce it to square-foot value. A. I can put it this way, sir: I should



think that a 20,000 square foot lot would be as valuable as one that would be 30 or 32 thousand square feet.

Q. Would be as valuable as 30 to 32 thousand? A. Yes, sir.

Q. You could get as much for it? A. Yes, sir.

Q. Then, anything in excess of that half acre would be surplusage, and have no material value; is that right? So far as the house site is concerned? A. Within reason. If you get up to an acre or two acres, I mean if you get up to two acres, something of that sort, it would be different.

203 Q. Your testimony is, if it was 10 to 12 thousand above the half acre, it wouldn't make the lot any more valuable? A. No, sir.

Q. Let's approach this valuation in another way: Are you acquainted with land values in the area? A. Yes, sir.

Q. Is there any difference in value between a half acre and an acre? A. In that particular area, I would say no, sir.

Q. You could buy a half acre just for the same price that you could buy an acre? A. Yes, providing the frontage was approximately the same.

Q. What can you buy an acre for? A. I think today, out there, an acre lot sells for around \$5,500 or \$6,000.

Q. \$5,500 or \$6,000? Have you made any purchases? A. Not within the last 18 months.

Q. Are property values rising out there, or dropping? A. Rising.

Q. They are rising? A. Yes, sir.

Q. So that about 18 months, that is when you based your -- A. Yes.

204 Q. Your figure of \$5,500 to \$6,000? A. Yes.

Q. For an acre lot? A. Yes. No, sir; that is what I would say today -- around \$5,500 to \$6,000.

Q. For an acre lot? A. Yes, sir.

Q. And the same price for a half acre? A. Yes, sir.

Q. Have you tried to buy a half acre? A person that owns an acre, actually selling it in two parcels, gets twice as much; is that your testimony? A. It depends, sir. I would like to put it this way: If you have got a hundred foot frontage, a lot 100 by 200 will bring as much money



as a lot 100 by 400. After you reach a certain depth in a piece of property, it doesn't really enhance the value of the property.

Q. The effect of your testimony, if I understand you correctly, is that a person with an acre is a pretty lucky person, because he can get twice as much for his -- A. No, sir.

Q. -- acre, by selling in two parcels?

\* \* \* \* \*

205 A. I should think a half acre of ground near the house in question today would certainly bring somewhere between five or six thousand dollars.

Q. A half acre? A. Yes, sir.

\* \* \* \* \*

207 Q. Due to the improvements thereon? A. Yes, plus the fact that values were rising in that community, practically daily.

Q. I see. A. Due to the development.

Q. What did you have, a quarter acre, or a half acre? A. I had just about a quarter --

\* \* \* \* \*

208 **REDIRECT EXAMINATION**

By Mr. Ingham:

Q. Mr. Webster, this is a survey, Defendants' Exhibit No. 1, of General Dillon's property. A. Yes.

Q. The contract calls for 145 front feet on Beechtree Road. A. Yes.

Q. So, in the event there is any loss of footage, it is in the back area some place. In your opinion, is there any difference in value between the front and back? A. I will say if the loss is taken --

209 Q. It has to be taken from the back, because he has the full frontage? A. It doesn't make any difference back here (indicating on plat). However, it would be in front.

Q. This slopes down, consider the long lot, 296 on one side, 356 on the other side, sloping down from the creek, if you will recall. A. Yes.



Q. Could you place any foot value on that back area? A. No, sir, that would be a little difficult, because after, as I recall this particular lot, after you reach a certain point, it drops down considerably, if I recall correctly.

Q. In your opinion, would it have any value? A. I don't think you could put any value on the back.

\* \* \* \* \*

212 The Witness: I think it was two.

Mr. Dillon: If it please your Honor, Mr. Nee testified that he was not in the building business, that he was just caught in this one deal through a mortgage. I am trying to establish, through this witness, and I am going to recall Mr. Nee in rebuttal, that he never built a home, he just completed this. I maintain that Mr. Nee was in the real estate business in that area, contrary to his testimony, and that is the reason I am asking this question.

\* \* \* \* \*

216 **MOSES DARBY**

called as a witness by counsel for defendants, and having first been duly sworn, took the stand, and was examined and testified as follows:

#### **DIRECT EXAMINATION**

By Mr. Ingham:

Q. State your full name. A. Moses Darby.

\* \* \* \* \*

217 Q. In June or July of 1952, were you employed by Mr. Nee?

A. Yes, sir.

Q. Do you recall when he became interested in a home at 8511 Beechtree Road? A. Yes, sir.

Q. Did you have occasion to be out there during that period?  
A. Yes, sir.

Q. How often were you there? A. I was out there at that



particular place about two months; around about that, with the exception of about three weeks.

Q. What were you doing there, Mr. Darby? A. Cleaning up around the house inside.

Q. Do you recall whether or not during that period there was any rainy spells? A. Yes, quite a few of them.

Q. Do you recall having been in the basement, in the recreation room? A. Yes, I was down there, too.

Q. Did you ever observe that the basement walls leaked or there was leakage under the floor, during that period? A. No, sir.

218 Q. During the same period, did you have occasion to be upstairs in the house? A. Yes, sir.

Q. To your knowledge, did the roof ever leak during that period? A. Not when I was out there.

Q. Mr. Darby, you said you were cleaning up the house? A. Yes, sir.

Q. And the lot? A. Yes, sir.

Q. Were you there when General Dillon took possession of the house? A. Yes, sir.

Q. Had you completed the cleaning of the lot at that time? A. Just about. I was there when the lady saw it.

Q. As you left it finally finished, had finished cleaning the lot, what was the condition of the back section? A. The back was in good shape.

Q. Was there any debris or rubbish left around? A. No, sir.

Q. How was the rubbish or building debris removed from the house? Do you recall? A. Yes, sir.

219 Q. How was it done? A. Moved by bulldozer.

Q. Where was it pushed? A. About a lot and a half further over, off the premises there.

Q. Off his lot? A. Yes, sir, and buried in the ground.

\* \* \* \* \*



Q. Did you have any occasion to do any seeding? A. I did.

\* \* \* \* \*

220 A. Front was sodded, and the seed was planted in back.

Q. The seed was planted in back? A. Yes, sir.

Q. Then -- A. But we, he was living there when we, or I put the seed in.

\* \* \* \* \*

### CROSS EXAMINATION

By Mr. Dillon:

Q. Did you have occasion to see the result of your seeding?

A. Yes, sir. I did.

Q. When? A. After I sowed the seed there I was still working around at different places, and I noticed over there, I saw a good stand of seed.

Q. You were -- A. I was still working around, and often noticed over there, and saw it was a good stand of seed.

221 Q. A good stand of -- A. The seed come up all right.

Q. Come up all right enough? A. Yes, sir.

Q. Would you say that it came up like sod? A. It came up like seed.

Q. Beg pardon? A. It comes up like seed, when you sow it.

\* \* \* \* \*

222 ROGER ALLEN MUSE

resumed the stand, and having been previously duly sworn, was examined and testified further as follows:

### REDIRECT EXAMINATION

By Mr. Ingham:

Q. Mr. Muse, during the recess you had occasion to make an inspection of the home of General Dillon? A. Yes, sir, I did.



223

Q. Will you tell the Court what you found as a result of your inspection?

The Witness: Your Honor, I made a thorough inspection of this property, and I find this: That General Dillon is confusing humidity with water coming up through a cement floor and through a tile floor, through a waterproof cement that holds it, something that I have never seen happen yet without loosening tile. Now, there is not a loose tile on that floor. He has no evidence of any water coming through any inside wall there whatsoever.

I made a thorough inspection around all the footing and everything. He tried to show me where water comes through, but I don't -- in the neighborhood of a hundred houses I have built myself, and those of others that I have been in, the only evidence at all of any water coming into that basement in any way, shape, or fashion, is through two window wells, and that in very small amount.

I went out and I inspected the window wells, and General Dillon told me that he had had those window wells cleaned out twice since he had lived there, but if those window wells had been touched since I left that house, in 1951, why, it shows no evidence of it.

224

There is an accumulation of leaves and debris in each one of the window wells. Water was standing in one at least three inches high, between two and three, put it down for two inches, and there was no sign of any water going into that basement from that water standing there, and evidently it has been in there, certainly it couldn't have accumulated in there with the little rain we have had today. There was not less than two inches of water in that one window well. There was none in the other.

I saw that water in that window well before I went to the basement, and I thought, well, now, if there is any water that can get through this wall anywhere, it will be there. He showed me in the center of that building where his wall for his maid's room comes out, and while there was possibly a space of three inches that showed the effects of dampness, that is 100 per cent humidity, I got down on my hands and knees and examined all of the woodwork that I put in there, and I may say this, that



all of those 2 by 4s in that basement that touch concrete or touch ground or nails, was treated so that no termites would get in there. Water could not come in there and stand on there, without showing water, and there is no such water mark.

225 Q. Mr. Muse, what condition did you find around the house where the plantings were? A. In the front of the house -- in front of the dining room wing, I found this: that he had a space a little bit wider than this (indicating), I'd say between four and five feet. He comes about 18 inches from his house and he has his planting there. True, he has his planting up on a ridge, but he has a drop-off back toward the house and a drop-off to where the sod starts. There is at least two inches of wall, and every bit of water that falls in that four or five foot has got to soak into the ground. What he should do is go back and bring his top soil -- he should bring his top soil even with the parging on the house. There is about four inches of parging on the house being exposed, because the ground has settled. If he did that, he will never have any more trouble. I don't think the General has had water in his basement through seepage. I think the water is due entirely to one hundred per cent -- due one hundred per cent to humidity.

226 Q. Will you describe the area where the General constructed his patio? A. Yes, sir. At the back of the recreation room, on the back side of the house, he has built a flagstone patio. I'd say it's 12 or 14 feet wide, coming out from the steps, from the landing. You go down and make a landing and turn to go the rest of the way to the recreation room, and just outside that door he has a large flagstone, it's at least 24 inches, 24 by 30. That is lying there and there is a crack of an inch and a quarter to an inch and a half between it and the wall. That is above the patio, but he has got a wall between that and the flagstone patio, and on the walkway leading out from that landing, or that flagstone, it's almost as level as this desk. And in my opinion, all the water that accumulates there will eventually come over the top of that flagstone and go down in that crack between that and the wall and go down beneath this patio.

I went down in the basement after making my outside inspection, and



the General pointed out to me where he thought the water was coming in through and wetting a place about two feet above the ground, or the basement floor level.

There is an inch furring strip between these York blocks and that knotty pine that is on there, so if there was any leak whatsoever there, that wall -- it would all come down and come underneath. It couldn't possibly get up there where the general says it is. I examined it and it showed no water marks, no moisture. The only thing I could find was where a knot in a piece of pine had been painted over, and I felt down at the bottom and it did show, right down at the bottom, right next to the tile, signs of humidity gathering that way in a basement, the way it will do.

Q. The General pointed out the area on the roof where a leak is alleged to have occurred, did he? A. Yes, sir.

227 Q. What did you find, or did you form an opinion as to a possible leak there? A. Yes, sir. I noticed that almost over the spot where the General said there was a leak, that he has a TV antenna erected on one of those spots. He said that another valley leaked.

\* \* \* \* \*

### RECROSS EXAMINATION

By Mr. Dillon:

\* \* \* \* \*

228 A. \* \* \* Now, if water came up through that six-inch concrete slab in that house, enough to push up through that asphalt and through that tile, every tile in that basement would be coming up. It wouldn't be sticking to that concrete floor. And there isn't a loose tile in your basement.

Q. You picked one up, didn't you? A. That was never cemented down. That was just lying over there.

Q. Then, there was a loose tile, you picked one up? A. It had never been cemented down, in the first place. Over there back of the furnace.

Q. Did you, as you went down the stairs into the basement



recreation room, did I ask you to examine the bottom of the wainscoting?

A. You did.

Q. Is that what you referred to as evidence of the scum, that green which had been cleaned, but the scum mark was along the entire length; is that right? A. I wouldn't say it was the entire length. It was possibly two-thirds of the way.

229 Q. So that, would you regard that as due to humidity settling down there? A. Yes, sir.

Q. Let me ask, is that the way humidity manifests itself? A. Sure.

Q. It is? Did you find it on the wainscoting along the rest of the wall in the recreation room? A. Yes, sir.

Q. Was there evidence of it again in the maid's room? A. It was more evidence in the maid's room.

Q. Did you see any evidence of mud having seeped in at floor level, in the maid's room? A. You tried to show it to me, General, but I couldn't see it.

Q. You couldn't see it? A. No, sir. You took me in that closet down there.

Q. Yes. A. And you tried to tell me that water had run under there and come up between the footing and the block.

Q. That's right. A. Now, General, I'll say this: that whatever water goes through a wall, it will certainly leave a water mark, and there is no more water mark in there where you told me that water was coming through, than there is right there (indicating in courtroom).

\* \* \* \* \*

231 Q. Let me review, for a minute, your testimony. Your testimony is that, in your opinion, no water comes in the recreation room, and that whatever evidence of moisture is present, that you observed, was due to humidity only; is that right? A. One hundred per cent. One hundred percent.

\* \* \* \* \*



232 Q. Did you see any evidence of asphalt there? A. No, sir, because as I explained to you there, we would leave it down so it wouldn't show, because it looked very badly.

Q. Then, did I offer you an opportunity to make sure, so that you could testify? Did I offer you a shovel? A. Yes.

Q. Did you take it? A. No, sir. I didn't want to dig in your property.

Q. I offered you that, so that you could straighten out this testimony. You testified that you put on an asphalt facing, and I had testified before this Court that there is no asphalt facing on three different probings, and if you were there to verify and refresh your memory, did I  
233 give you that opportunity?

\* \* \* \* \*

A. No, sir, it didn't. I wouldn't say that it did or it didn't have, now, but I'll say this much: there is no water going through any parging to that house, whether it has or whether it hasn't the asphalt. It was one of three things: it has either the asphalt or this special waterproofing compound that Smith got me to brush on, which is colorless, or it has Ironite in the original concrete parging. Either of the three is as good, all three of them are waterproof.

\* \* \* \* \*



239

**BEATRICE WILSON**

called as a witness by the plaintiffs, and having first been duly sworn, took the stand, and was examined and testified as follows:

240

**DIRECT EXAMINATION**

By Mr. Dillon:

Q. Don't be nervous. Just talk out loud, so that the Judge can hear you. State your name, where you reside, where you live.

A. Beatrice Wilson. 8511 Beechtree Road.

Q. By whom are you employed? A. J. V. Dillon, General J. V. Dillon.

Q. Where do you reside in that house? A. In the basement.

Q. How long have you been employed there? A. Since last May.

Q. Since last May? I ask you, Beatrice, have you ever observed any water in the basement? A. I did.

Q. You live down there; is that correct? A. That's right.

Q. Will you describe to the Court when you see this water, and how much, and where it is? A. It's every time it rains, water settles and it comes in around the basement of the floor and in puddles. I mopped, this last rain we had, I mopped water all day, trying to keep it up.

241 Q. Where was that? A. In the basement, the whole thing, down in the basement. The recreation room, my bathroom, washroom, my bedroom.

Q. How about the laundry? A. The laundry wasn't as bad as this other, but it did have water in it.

Q. Where did that appear to be coming from, the water?  
A. Around the base of the wall, coming inside.

Q. Did anyone help you, and has anyone been employed to constantly help you on these jobs of mopping during or after a night's rainfall? A. That's right.

Q. Who has been? A. John Jones.

Q. Does it take your entire day? A. Takes the whole day trying



to keep it up. That's all I do when it starts raining a real rain, trying to keep up with the water.

Q. I call your attention to the baseboards in the recreation room, just as you come down the stairs to the recreation room. Did you notice any scum or discoloration along that baseboard? A. I did.

Q. Was it up around that level? A. About that much (indicating).

242 Q. Causing that discoloration? A. Yes.

Q. Have you cleaned that after every rainstorm? A. Every time it rains, I have to clean it.

Q. Is it true that in the rear of the recreation room, down toward the television, and across from that point, are there puddles that need mopping there after every rainstorm? A. That's right. Whole puddles. Just like somebody just poured water in the floor. It settles.

Q. Has this occurred every time that there has been a rainstorm since you have been there? A. That's right.

Q. Has there ever been a rainstorm of any consequence where you were not engaged and did not observe it? A. Every time it rains I have to clean up water, mop up water, and also every time it rains I have to move upstairs.

Q. And occupy one of the bedrooms upstairs? A. The guest room; that's right.

Q. I am glad you mentioned that. You have a closet in your room? A. That's right.

243 Q. What do you leave on the floor of the closet? A. My shoes, my luggage, and some bags. I have several bags I had to throw away, and my shoes were soaked. I had to take them upstairs, which is still upstairs, and my luggage is still upstairs.

Q. Do you know what I mean by humidity, Beatrice? A. Yes.

Q. Do you know the difference between humidity and water? A. Yes.

Q. What is the difference, if you can explain -- humidity is dampness in the air? A. Dampness; that's right.

Q. In the air? A. That's right.



Q. Are your shoes wet, when in that closet were they by dampness in the air or were they wet by water? A. Water, because these were soaked.

Q. They were sitting in a puddle of water in the closet? A. That's right.

Q. Is that your testimony? A. That's right.

Q. In the laundry, shortly after you were given a new mattress, and the old mattress was placed where, in the basement? A. In the washroom.

Q. In the laundry? A. That's right.

244 Q. What happened to that mattress? A. It was soaking wet and come to pieces.

Q. Was that just on the side that was down in the water, or was it moisture or humidity on top, or was it on the side that was in the water? A. The whole thing was soaking, up about that high on the mattress, there was about that much in the water.

Q. It had soaked up that water? A. Yes, sir.

Q. The top of the mattress was dry? A. Dry. And also the rug I had.

Q. There was a rug that was removed from your room and rolled up in the laundry; is that correct? A. Yes.

Q. What happened to that rug? A. It come to pieces. It soaked up the water and just come to pieces.

Q. This was water that caused it, and not -- you understand what we are talking about when we say moisture? A. Water. This was water, because when I stepped on the rug, after it had rained, water would squish out, like wringing out a rag. I'd take it out and wring it, and water would come out.

245 The Court: State, if you know, whether water came in from outside, as water, or was condensed on the walls, condensation.

The Witness: It was water.

The Court: Do you know where it came in?



The Witness: Yes, sir, I do.

The Court: Where?

The Witness: Around the base. Around the base, like that (gesturing). Comes in and runs in and runs all of the floor.

### CROSS EXAMINATION

By Mr. Ingham:

Q. You stated water stood in pools in the recreation room?

A. That's right.

Q. How deep? A. About an inch or more. It stood enough, when I stepped in with my shoes, it would get them all wet. I'd have to change shoes in mopping it up.

Q. Would it stand that deep around the door? A. Yes, sir, it did. It come in, down the stairs, down the steps. I had to put paper and stuff, to come down.

Q. Coming through the door? A. It's around the basement and setting all around over the whole floor.

246 Q. Did you notice any water coming in around the door to the recreation room, the one that leads out? A. Yes, water was there. It wasn't -- the water there was running down to there, most of the water was coming from the other wall, all around the wall.

Q. Those bare boards are all stained and show water stains? A. Yes, sir, they do.

Q. How high? A. The floor do, too.

Q. How high up does the baseboard or pine paneling show water stains? A. About like that (indicating on finger.). I tried to keep it mopped up, because I have to go in and out.

Q. Did you see any signs of water marks higher up? A. No.

Q. Any place there? A. No, sir, I never seen any higher up.

Q. If General Dillon had testified that there is a mark and the water came through the wall and -- A. That comes from upstairs in the bathroom, up in his bathroom.

Q. Comes through the wall up there? A. A leak in his bathroom, too.



Mr. Dillon: You are referring to the roof leak, now.

247 The Witness: That's what I'm talking about. Even the walls, up there, the stuff came down, turned loose and fell in the tub. I've been cleaning that. That's in his bathroom.

By Mr. Ingham:

Q. During these rainy spells, do you sleep down in the basement?

A. I can't, when it's raining. I get too wet.

Q. The next day? A. I wait until it gets dry, to go back.

Q. After a rainy spell, is the basement damp, do you remember --

A. Damp enough to cause me to turn the heat on to dry it out some, and I sleeps in the guest room.

Q. You came in May. You haven't had heat except --

A. We have been having heat earlier, because we had to dry the basement out.

Q. But the General has a humidifier in the basement? A. That's what I mean.

Q. Not heat, but a humidifier. A. We have been having the heat on, too, with that humidifier. It doesn't take up that water.

Q. How often is the humidifier on? A. It runs every day until I go down.

Q. Is that automatic, or do you have to turn it on? A. I turn it on.

Q. You turn it on? A. Every day, until I go down to bed, and I take it off.

\* \* \* \* \*

249 The Court: I am inclined to think that what would be most helpful to me would be not an elaborate brief, in the technical sense, but a written summary of your interpretation of this evidence, and what law applies.

I have heard the testimony. There is great variance of testimony here.

The legal problem will not be great, as I study those two instruments; the contract for sale and the settlement agreement, or addendum, whatever you call it, will determine the legal rights of the parties, the legal situation.



I will say this much: It seems to me clear, from the evidence, that there is a discrepancy as to acreage, square footage, between the contract and the deed. The deed ought to be corrected, however, to show the correct acreage or square footage that is within the measurement, the linear measurement.

This surveyor indicated that a proper figure of square footage from that little plat would --

Mr. Dillon: Which was known to the defendant before the deed was prepared.

Mr. Ingham: And known to the plaintiff, too.

The Court: All that I am saying is that there is a correction, that should be made as to that.

250 Then, the evidence is quite clear that the damage from the difference is not great damage.

The law will not say that there is no cause for complaint when there is a difference of acreage.

The whole history of Anglo-Saxon jurisprudence puts too much emphasis on land and land ownership.

There is a difference, a variance, there, between the contract and the deed. Even after the deed is corrected to show a larger square footage, there is still a difference, it seems to me.

---







**BRIEF FOR APPELLEES**

---

**United States Court of Appeals**

**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

*United States Court of Appeals  
For the  
District of Columbia Circuit*  
**FILED** MAY 1 1956

---

**No. 13,196**

---

**DERMOT A. NEE,  
and  
ANTOINETTE K. NEE,**

**Appellants**

**v.**

**JOSEPH V. DILLON,  
and  
LOIS B. DILLON,**

**Appellees**

---

**APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

---

**J. V. DILLON**

**1625 Eye Street, N. W.  
Washington 6, D. C.**

**Attorney for Appellees**







(i)

No. 13,196

**APPELLEES' STATEMENT OF QUESTIONS PRESENTED**

1. The question is whether, in a suit asking for rescission of a contract for the sale of real estate or alternatively for specific performance and damages, the Court may rescind the contract and allow plaintiff to recover his expenditures?

2. Did the Court err in rescinding a contract for the sale of real estate, where the amount of land conveyed was substantially less than the amount of land described in the contract of sale?



## INDEX

|                                                                                                                                                                            | <u>Page</u> |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| STATEMENT OF THE CASE . . . . .                                                                                                                                            | 1           |
| SUMMARY OF ARGUMENT . . . . .                                                                                                                                              | 2           |
| ARGUMENT . . . . .                                                                                                                                                         | 3           |
| 1. Where injury caused by breach of contract<br>is irreparable, and specific perform-<br>ance is impossible the injured party<br>may resort to equity for rescission . . . | 3           |
| 2. Rescission and recovery of expenditures by<br>aggrieved party is proper remedy . . . .                                                                                  | 4           |
| 3. Laches or timeliness for rescission is a<br>question of fact for the Court . . . . .                                                                                    | 6           |
| CONCLUSION . . . . .                                                                                                                                                       | 7           |

## TABLE OF CASES

|                                                                            |   |
|----------------------------------------------------------------------------|---|
| Kemp v. Weber, 24 A. 2d 779, 180 Md. 362 . . . . .                         | 4 |
| Hortman v. Mueller, 195 Wis. 485, 218 N.W. 584 . . .                       | 4 |
| Stern v. Ace Wrecking Co., (Mun. Ct. App. D.C.),<br>38 A. 2d 646 . . . . . | 5 |
| Graham v. Atchison, T & S. F. Ry., 176 F. 2d 819<br>(C.C.A. 9) . . . . .   | 6 |
| Robert Hind, Ltd. v. Silva, 75 F. 2d 74 (C.C.A. 9) . .                     | 6 |
| Younis v. Hart, 59 Cal. App. 2d 99, 138 P. 2d 323 . .                      | 6 |
| 9 American Jurisprudence, Sec. 28, p. 374 . . . . .                        | 3 |



**UNITED STATES COURT OF APPEALS**  
**For The District Of Columbia Circuit**

---

**No. 13,196**

---

**DERMOT A. NEE,**  
**and**  
**ANTOINETTE K. NEE,**  
**Appellants**

**v.**

**JOSEPH V. DILLON,**  
**and**  
**LOIS B. DILLON,**  
**Appellees**

---

**APPEAL FROM THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF COLUMBIA**

---

**BRIEF FOR APPELLEES**

---

**STATEMENT OF THE CASE**

By a contract of sale dated June 5, 1952 the appellants undertook to deliver a parcel of land in Maryland, with an improvement thereon. On July 18, 1952 the parties met at the Suburban Title and Investment Company in the District of Columbia to close the contract. At that time, however, the deed to the property was not prepared. Because certain items in the contract of sale were either not completed or not properly completed, the parties agreed that the buyer should pay the purchase price and an additional amount agreed upon for extras, and that \$850.00 of the adjusted purchase price should be held in escrow by the Suburban Title and Investment Company pending the completion of the items enumerated in the agreement (Plaintiffs' Ex. No. 6, JA 30).



The Suburban Title and Investment Company prepared the deed, which was signed and sealed by appellants and delivered to appellees sometime after July 30, 1952 (JA 32).

Upon examination of the deed the appellees noted a variance between the amount of land described in the contract of sale and the deed amounting to 1, 528 square feet (JA 32). Appellee immediately notified appellants of the variance and appellants indicated they would make it good (JA 32). At that time appellants owned the contiguous land and could have rectified the variance (JA 32).

Negotiation by letter and telephone followed, in which this matter and other failures on the part of appellants to fulfill their obligations under the contract of sale and the escrow agreement were discussed (JA 33-34). Finally in November of 1953 it became apparent to appellees that appellants intended to do nothing regarding the variance or their other obligations under the contract of sale, and accordingly this suit was instituted.

### SUMMARY OF ARGUMENT

1. The Court properly rescinded the contract upon finding, amply supported by the evidence, that there was a substantial variance in land area between that described in the contract of sale and that delivered by the deed.

2. The Court properly determined that because of the continuing efforts of the parties to settle their differences by negotiation the appellants are not in a position to object to appellees' occupancy of the land. And that during such occupancy any expenditures by the occupants (appellees) to do what the contract obliged the appellants to do was properly refundable to the appellees.



## ARGUMENT

1. Where injury caused by breach of contract is irreparable, and specific performance is impossible the injured party may resort to equity for rescission.

The original contract of sale, dated June 5, 1952, called for 39,495 square feet of land. The deed, dated July 30, 1952, described the land by metes and bounds and stated the area to be 37,967 square feet. It is to be noted that on July 18, 1952, the appellees had paid the purchase price. At the time of delivery of the deed (sometime after July 30, 1952) the purchasers (appellees) were occupying the house. When they noted the variance they immediately notified the sellers (appellants) and the appellants, who were then the owners of contiguous property, promised to make good the difference. The appellees with these assurances remained in occupancy.

Sometime later the appellants, ignoring the demands of appellees and repudiating their assurances to make good the shortage, sold the adjoining property.

The Court found that there was a variance of nearly 1,000 square feet between the amount of land called for by the contract and the amount delivered in the deed (JA 11), and also from the evidence the Court concluded that the shortage of land was never waived by the appellees (JA 12).

"It is a well-established equitable principle that where the injury caused by breach of contract is irreparable, or the damages that might be awarded would be inadequate, or difficult or impossible to determine, the injured party may resort to equity for rescission. This rule is particularly applicable in the case of a building or construction contract by the contractor's failure to perform in substantial compliance with specifications." 9 American Jurisprudence, Sec. 28, p. 374.



And where a party to a contract is faced by some failure of the other party in carrying out its terms he has, in general, either a right to retain the contract and collect damages for its breach or a right to rescind the contract and recover his own expenditures. Kemp v. Weber, 24 A. 2d 779, 180 Md. 362.

2. Rescission and recovery of expenditures by aggrieved party is proper remedy.

At the time of settlement on July 18, 1952 the situation of the parties was as follows: Appellees occupied the premises and certain items enumerated in the contract of sale to be completed by the appellants were either not completed or not properly completed. The deed was not prepared at that time and was not in fact delivered to appellees until sometime after July 30, 1952. At the settlement the parties agreed that the buyer should pay the purchase price and an additional amount agreed upon for extras and that \$850.00 of the adjusted purchase price should be held in escrow by the Suburban Title and Investment Company pending the completion of certain enumerated items in the agreement (JA 30).

The deed was delivered sometime after July 30, 1952 and from that time on until the institution of this suit the appellees attempted to obtain that which they contracted and paid for, with assurances by the appellants that the shortage in land would be made good.

The appellants assert that there was no allegation or proof of fraud or misrepresentation. But it is submitted that the variance which was asserted and proved constitutes the misrepresentation upon which rescission is properly predicated.

A description in land contract showing lot to have nine feet more depth than it actually had, was held to be a material misrepresentation entitling purchaser to rescind. Hortman v. Mueller, 195 Wis. 485, 218 N.W. 854.



And it has been held that neither defense of mistake nor impossibility of performance can prevail if the inability to perform was caused by the promisor and unknown to promisee. Stern v. Ace Wrecking Co., (Mun. Ct. App. D.C.) 38 A 2d 646. In the present case, the Court found that after demand by appellees was made upon appellants to make good the deficiency in land from adjoining property which the appellants then owned, the appellants ignored the demand and sold the adjoining property (JA 12).

Not only was the shortage in land not made good, but appellants also failed to fulfill their obligations under the escrow agreement. In addition, shortly after occupancy the roof of the house leaked and the leakage spoiled the finish in some rooms of the house. The appellants repaired the roof but refused to repair the damage caused by the leak. The Court found that this was done at appellees' expense, that it constituted a permanent improvement to the property for which the appellees are entitled to recover (JA 13).

The Court also found that appellees spent \$685.13 for the installation of a properly constructed and graded driveway, an item enumerated in the escrow agreement. The Court found from the evidence that such expenditure was justified, that it provided a permanent improvement to the property, and is an expenditure for which the appellees are entitled to recover.

The contract of sale provided: "Entire house to be finished in all detail in a good and workmanlike manner . . ." (Plaintiffs' Ex. No. 1, JA 26). Testimony showed that upon occupancy doors throughout the house were not properly fitted. The Court found that appellees expended \$42.00 "for the proper fitting of all doors", and determined it to be a justifiable expense and an improvement to the property for which the appellees are entitled to refund (JA 15). In rescinding the contract the Court allowed only the expenditures by appellees which were for permanent improvements to the property which under the contract the appellants were obliged



to do. It is submitted that the Court properly rescinded the contract and allowed the appellees their expenditures. Kemp v. Weber, supra.

3. Laches or timeliness for rescission is a question of fact for the Court.

Appellees wanted their contract if they could have it. And as late as June 12, 1953, more than a year after the contract of sale, the appellants were still assuring appellees. In a letter to appellee on that date appellant wrote: "I want to give you all that you bought, and more besides, and if I have failed, and I know that you have addressed yourself accordingly, I would like to have an opportunity now to make things right." (J.A. 34) This gave appellees hope that they might have their contract and it was not until November of 1953 when all hope was abandoned and this suit was instituted.

After leading the appellees on, the appellants cannot be heard to complain of any delay in electing to rescind.

Timeliness is a question of fact for the trier of the facts. It was stated in Graham v. Atchison, T. & S. F. Ry., 176 F. 2d 819, 827 (C.C.A. 9):

" \* \* \* equity demands that he who rescinds a contract, be not guilty of laches in so doing. But, there is no hard and fast rule as to what lapse of time will amount to laches. Every case must be judged by the facts surrounding it. \* \* \* This Court in Robert Hind, Ltd. v. Silva [75 F. 2d 74, C.C.A. 9] ruled that in the absence of a showing of detriment a delay of nearly two years presented a question of fact. Judge Wilbur wrote [75 F. 2d 78], 'Moreover it is not shown that the delay in bringing the suit has worked any prejudice or disadvantage to appellant, and it is well settled that mere delay in asserting a right does not ipso facto bar its enforcement in equity, by the great weight of authority unless the case is barred by the statute of limitations.' "



And in Younis v. Hart, 59 Cal. App. 2d 99, 138 P. 2d 323 (1943) where vendor misrepresented the frontage of a lot as being 110 feet when in fact it was only 102.79 feet. The vendee took and occupied the property without knowledge of the misrepresentation. After learning of the misrepresentation vendee attempted, as in the case at bar, to adjust the matter without litigation. When, months later friendly negotiations ended, the formal notice of rescission followed. In that case where the Court rescinded the contract the Court said:

"A kindly approach thus attempted to effectuate the settlement of an ugly controversy is not to be discouraged because the first communication did not formally demand rescission."

In the case at bar the Court considered the question of timeliness and concluded (J. A. 12):

"The plaintiffs' continued occupancy of the property after discovery of the shortage of land would preclude their right to rescission if it were not for the effect of the escrow agreement and the continuing negotiations for settlement. Because of the continuing efforts of the parties to settle their differences by negotiation and correspondence, the defendant is not in a position to object to the plaintiffs' occupancy of the land. Neither is the defendant justified in opposing rescission because the market value of the property would be slightly affected, if at all, by the shortage in land area. A contract for a definite acreage cannot be complied with by delivery of a substantially less acreage. Such a failure entitles a party to rescission."

### CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Court below should be affirmed.

J. V. Dillon

1625 Eye Street, N. W.  
Washington, D. C.

Attorney for Appellees.